In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-848

NORTHERN NATURAL GAS PRODUCING COMPANY and MOBIL OIL CORPORATION, *Petitioners*,

vs.

HAZEL NIX and FRED SCHUPBACH, JR., individually and as representatives of all that class of gas royalty owners under Northern Natural Gas Producing Company and Mobil Oil Corporation oil and gas leases in the Hugoton-Anadarko area, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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No. .....

NORTHERN NATURAL GAS PRODUCING COMPANY and MOBIL OIL CORPORATION, *Petitioners,*

vs.

HAZEL NIX and FRED SCHUPBACH, JR., individually and as representatives of all that class of gas royalty owners under Northern Natural Gas Producing Company and Mobil Oil Corporation oil and gas leases in the Hugoton-Anadarko area, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

The Petitioners, Northern Natural Gas Producing Company ("Northern") and Mobil Oil Corporation ("Mobil"), respectfully pray that a writ issue to review certain portions of the judgment and opinion of the Supreme Court of the State of Kansas, entered in this proceeding on July 29, 1977.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Kansas is reported at 222 Kan. 739, 567 P.2d 1322 (1977), and appears in Appendix A hereto (pp. A1-A7). The opinion of the Supreme Court of the State of Kansas in *Shutts, Executor* v. *Phillips Petroleum Company*, 222 Kan. 527, 567 P.2d 1292 (1977), followed and held to be controlling of the decision in this case, appears in Appendix B hereto (pp. A8-A72). The opinions of the District Courts of Grant and Kiowa Counties, Kansas, in the form of Findings of Fact and Conclusions of Law, not reported, appear in Appendices C and D hereto (pp. A73-A84).

JURISDICTION

The judgment of the Supreme Court of the State of Kansas was entered on July 29, 1977. Petitioners filed a timely petition for rehearing, which was overruled on September 15, 1977, and the instant petition for a writ of certiorari was filed within ninety days of said date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

The Supreme Court of the State of Kansas is the highest court in the State of Kansas in which a decision can be had.

STATUTES INVOLVED

K.S.A. 60-223 is set forth in Appendix E hereto (pp. A85-A88). The Fourteenth Amendment, Section 1 of the United States Constitution, is also set forth in Appendix E hereto (p. A88). Federal Rule of Civil Procedure 23 is also set forth in Appendix E hereto (pp. A89-A92).

QUESTION PRESENTED

The Kansas Supreme Court has ruled that under the Kansas class action statute (K.S.A. 60-223), it has jurisdiction to render a judgment binding upon unnamed nonresident members of a putative plaintiff class, even though such persons have no contact with the State of Kansas. Further, the Kansas Court has held that its jurisdiction over such nonresidents is established ". . . if procedural due process guarantees are met." *Shutts*, supra, 222 Kan., at 547, 567 P.2d, at 1308, held to control in *Nix, et al.* v. *Northern Natural Gas Producing Company and Mobil Oil Corporation*, 222 Kan. 739, 567 P.2d 1322. The question presented is whether this decision denies to Petitioners and to nonresidents having no contacts with Kansas, due process and equal protection under the law and the benefits of a supposedly final adjudication, all in violation of the Fourteenth Amendment to the Constitution of the United States.[1]

STATEMENT OF THE CASE

This case was commenced in the District Court of Stanton County, Kansas, by named Kansas residents, on

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1. In the Courts below Petitioners contended that the decisions of the Kansas Supreme Court denied to Petitioners the protection of Kansas statutes relating to interest and limitations of action. Petitioners reserve the right to urge these issues in briefs and argument in the event certiorari is granted.

their own behalf and as alleged representatives of a class composed of certain of Petitioners' royalty owners in the Hugoton-Anadarko area of Kansas, Oklahoma and Texas. The class for which the named Plaintiffs (Respondents here) sought to speak included numerous persons who neither resided in nor had any contact with the State of Kansas, and whose royalties were payable under lease contracts applicable only to production from lands in Texas and Oklahoma (222 Kan. 739, 567 P.2d 1322, 1326, App. A, p. 12). Over the vigorous protests of Petitioners, the trial court certified the class as requested by Respondents.

The action sought a judgment for interest on royalty payments deferred pending approval of certain rate increases established by FPC Opinion No. 586 and collected subject to refund by Defendants. No claims for additional royalties were involved.

The trial court entered judgment for the class as certified and that judgment was modified and affirmed by the Supreme Court of Kansas. Petitioners challenged the Kansas Courts' assertions of jurisdiction at every stage of this case, contending that the Kansas Courts were without jurisdiction to enter a judgment binding upon persons who were without residence in or contacts with the State of Kansas and who had no interest in Kansas lands or royalties attributable to production therefrom (Answer, R. 5, 7; Defendants' Response to Request for Admissions, R. 11, 12; Memorandum Decision on Motion for Reconsideration of Class Certification, R. 47; Pre-Trial Conference Order, R. 57; Defendants' Requested Findings of Fact and Conclusions of Law, R. 84-88; Trial Court's Conclusions of Law, R. 126; Appellants' Statement of Points on Appeal, R. 135).

The Kansas Supreme Court addressed Petitioners' arguments directly in *Shutts* v. *Phillips Petroleum Company*:[2]

> "The appellant *contends* the trial court erred in holding that it has jurisdiction over *in personam* claims of unnamed nonresident class plaintiffs having no contact with the State of Kansas.
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> ". . . The question presented is how can a Kansas court assert jurisdiction in a *plaintiff class action*, where some of the individual plaintiff class members do not reside in Kansas and do not have land in Kansas covered by leases with Phillips." 222 Kan. 540, 541, 567 P.2d 1304 (App. B, pp. A30, A31).

The Court concluded, erroneously we believe, that

> ". . . Therefore, while the essential element necessary to establish jurisdiction over nonresident defendants is some 'minimum contacts' between the defendant and the forum state, *the element necessary to the exercise of jurisdiction over nonresident plaintiff class members is procedural due process.*" 222 Kan. 542-543, 567 P.2d 1305 (App. B, p. A33).

The Kansas Supreme Court adopted its decision in *Shutts* as controlling in the instant case, and it is this ruling which forms the basis of the petition of Northern and Mobil to this Court.

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2. *Shutts*, 222 Kan. 527, 567 P.2d 1292 (1977) (App. B, pp. A8-A12), cited by the *Nix* Court as controlling in the instant case. 222 Kan. 739, 740, 567 P.2d 1322, 1323 (1977) (App. A, p. A3).

REASONS FOR GRANTING WRIT

The Decision Below Seriously Threatens the Effectiveness of the Guarantees of Due Process Afforded by the Fourteenth Amendment to the United States Constitution.

If allowed to stand, the decision of the Kansas Supreme Court in this case will result in a serious erosion of the protections afforded by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which have long been jealously guarded by this Court [*Shaffer* v. *Heitner*, ... U.S. ....., 53 L.Ed.2d 683, 97 S.Ct. 2569 (1977)].

Giving lip service to *International Shoe Co.* v. *Washington*[3] (but only insofar as it affects defendants), the Kansas Supreme Court denies its applicability to nonresident members of a plaintiff class, even though they are devoid of even the most minimum contacts with the State of Kansas. The result can only be a judgment which will not be accorded full faith and credit when asserted as *res adjudicata* of the issues in the courts of other states. The Kansas Court reaches the conclusion that such plaintiff class members are subject to the jurisdiction of its state courts where "procedural due process" is demonstrated.

This bootstrap approach is untenable. It is illogical to apply different jurisdictional rules to defendants and plaintiffs simply because of their designation or alignment, when the ultimate result may be the same for each. The inevitable result is denial of due process to both.

3. 326 U.S. 310 (1945).

No amount of due process can create jurisdiction where none previously existed. Absent jurisdiction, the decision is a nullity as to nonresident, no-contact members of the plaintiff class, thereby denying Petitioner the benefits of final adjudication. The Kansas decision ignores the fact that jurisdiction through some minimum contact must exist before due process comes into play. *International Shoe Co.* v. *Washington*, supra. The substitution of "procedural due process" for the "minimum contacts" required by *International Shoe* as the basis of jurisdiction would permit the state court to create jurisdiction where none existed through procedural safeguards. This ignores the mandate of *International Shoe* that the "quality and nature of the activity" establishes jurisdiction,[4] if, such jurisdiction having been established, due process is otherwise afforded the nonresident party.[5]

Moreover, the Kansas Supreme Court has overlooked or ignored the fact [as stated in the notice to the alleged class (R. 54)] that the judgment purports to be binding on all class members, whether it be favorable or unfavorable. In these circumstances a nonresident plaintiff class member, with no Kansas contacts, may find himself subject to an adverse judgment which, under the jurisdictional theory of the Kansas Court, the Court would have no jurisdiction to render against him as a defendant lacking the minimum contacts prescribed by *International Shoe*, supra. Not only would unnamed nonresident class members be bound by an adverse judgment, but they could

4. *International Shoe*, 326 U.S. 310, 319.

5. This Court has consistently held procedural rights could not abrogate substantive rights. *Hansberry* v. *Lee*, 311 U.S. 32 (1940); *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974).

be subjected to an affirmative judgment granted defendant on the basis of a counterclaim.

Thus, a defendant, after obtaining a favorable judgment in Kansas, could encounter a denial of full faith and credit to such judgment in a suit involving the same issues brought by the nonresident, no-contact plaintiff class member in the state of his residence. *Hanson* v. *Denckla*, 357 U.S. 235 (1958). The result is to deny the protection of the Due Process Clause of the Fourteenth Amendment to the United States Constitution to both Petitioners and Respondents.

The problem which now faces this Court is a product of the evolution of class action jurisdiction, as reflected by this Court's recent decisions.[6] These decisions have limited substantially the cases which may claim the attention of the Federal Courts. At the same time the Court has made clear its continued adherence to the doctrines of *Pennoyer* v. *Neff*,[7] as modified by *International Shoe Co.* v. *Washington*, supra. In *Shaffer* v. *Heitner*, supra, this Court applied the minimum contact rule of *International Shoe* to cases of *in rem* jurisdiction, saying:

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6. *Snyder* v. *Harris*, 394 U.S. 332, reh. den. 394 U.S. 1025 (1969); *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974).

7. 95 U.S. 714 (1878). *Pennoyer* v. *Neff* held a state court's jurisdiction was limited to the boundaries of the state in which it sits. Subsequently, in *International Shoe Co.* v. *Washington*, supra, this Court held that in personam jurisdiction may attach on the basis of a nonresident's contacts with the forum state but those contacts must relate to the issues before the court. In *Shaffer* v. *Heitner*, supra, this Court further restricted the jurisdiction of state courts in *in rem* actions, holding that where the property in the state was unrelated to the plaintiff's cause of action, the state court did not have jurisdiction, unless other significant contacts existed.

> "We therefore conclude that *all assertions of state court jurisdiction* must be evaluated according to the standards set forth in International Shoe and its progeny." (Emphasis supplied). ..... U.S. ....., 53 L.Ed.2d 703, 97 S.Ct. 2584.

The Court concluded its opinion with the unqualified reaffirmance of the protections of the Due Process Clause:

> "The Due Process Clause
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> " 'does not contemplate that a state may make binding a judgment . . . against an individual or corporate defendant with which the state has no contacts, ties or relations.' International Shoe Co. v. Washington, supra, at 319, 90 L Ed 95, 66 S Ct 154, 161 ALR 1057.
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> "Delaware's assertion of jurisdiction over appellants in this case is inconsistent with that constitutional limitation on state power. The judgment of the Delaware Supreme Court must, therefore, be reversed." ..... U.S. ....., 53 L.Ed.2d 705, 97 S.Ct. 2587.

The situation is no different whether the judgment seeks to bind a party defendant or an unnamed member of a putative plaintiff class who, equally with a defendant, lacks minimum contact with the state. The Kansas Supreme Court's reliance on the dicta in *Hansberry* v. *Lee*,[8]

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8. *Hansberry* v. *Lee*, 311 U.S. 32 (1940). The Supreme Court merely discussed by way of dicta that a court could have jurisdiction over individuals where ". . . some are not within the jurisdiction. . ." and ". . . who were not made parties to it. . . ." 311 U.S. 40-42. The Court did not discuss whether those nonresidents had to have some previous contact with the forum state and, in fact, the Court held that a judgment in a class action in a state court construing restrictive covenants on land in Chicago, was not binding on persons who were not actual parties.

is misplaced. In the first place the exception was not precisely defined in *Hansberry*. Further *Shaffer* v. *Heitner*, supra, eliminated any significance which the dicta may have had when this Court said: "To the extent that prior decisions are inconsistent with this standard [referring to the standards for determining jurisdiction as expressed in *Pennoyer, Harris* and *International Shoe*] they are overruled. . . ."[9]

We cannot believe that after *Shaffer* this Court will countenance the subversion of the protections of the Due Process Clause which would result if the decision of the Kansas Supreme Court in the case at bar is allowed to stand. The result is to deny to both Petitioners and the nonresident, no-contact plaintiff class members the protections afforded them by the United States Constitution.[10]

The Kansas Supreme Court's Decision Is Directly Contrary to the Decisions of This Court and to the Decisions of Certain of Kansas' Sister States.

In *Pennoyer* v. *Neff*, supra, this Court noted the territorial limits imposed upon the jurisdiction of the several states by the United States Constitution. The highest

9. ..... U.S. ....., 53 L.Ed.2d 703, n. 39, 97 S.Ct. 2585, n. 39.

10. This Court made clear the distinction between jurisdiction and procedural due process in its *Shaffer* decision, when, in commenting upon the notice served, the Court noted:

". . . In these circumstances, we shall assume that the procedures followed would be sufficient to bring appellants before the Delaware courts, *if minimum contacts existed.*" ..... U.S. ....., 53 L.Ed.2d 703, n. 40, 97 S.Ct. 2585, n. 40. (Emphasis supplied).

The Kansas Supreme Court failed to recognize this basic principle of law, but instead held that the mere mailing of a postcard notifying an alleged class member in another state regarding litigation in Kansas was sufficient to create jurisdiction.

courts of Pennsylvania and New Jersey have declined to extend the jurisdiction of their state courts to nonresidents without minimum contacts in the state. In *Klemow* v. *Time, Incorporated*,[11] the plaintiff sought to represent a class consisting of both residents and nonresidents of the State of Pennsylvania, in a suit initiated in the Pennsylvania state court. While the dismissal of plaintiff's suit was reversed on other grounds, the Pennsylvania Supreme Court commented as follows with respect to the propriety of a class including nonresidents of Pennsylvania:

> "Here it is conceivable that appellant could plead and establish that he can properly represent a class composed of all Pennsylvania residents[15] with similar unexpired LIFE subscriptions who have not settled their claims and have similar damage claims to be resolved.[16]
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> * * *
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> "15. Because the jurisdiction of the courts of the Commonwealth is territorially limited, the class may consist only of Pennsylvania residents. The class may also include nonresidents who submit themselves to the jurisdiction of the state courts. See Botwinick v. Credit Exchange, Inc., 419 Pa. 65, 213 A.2d 349 (1965); Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); Pennoyer v. Neff, 95 U.S. 714 (1877) [sic 1878]; cf. Simpson v. Simpson, 404 Pa. 247, 172 A.2d 168 (1961); McGinley v. Scott, 401 Pa. 310, 164 A.2d 424 (1960).
>
> "16. Appellant's complaint states that he represents a class of all persons who had unexpired LIFE sub-

11. 466 Pa. 189, 352 A.2d 12 (1976).

scriptions—more than 5 million people. The record indicates however that the class of which he is a member will be substantially smaller. The class is limited by the court's jurisdiction, note 15 supra." 466 Pa. 189, 352 A.2d 12, 16.

In *Feldman* v. *Bates Manufacturing Co., Inc.*, 143 N.J. Su. 84, 362 A.2d 1177 (1976), plaintiff sought to prosecute a class action in the New Jersey state courts on behalf of an alleged class, including both residents and nonresidents having no contacts with the State of New Jersey. The Appellate Division of the Supreme Court of New Jersey declined to permit maintenance of the action on behalf of the nonresident class members. The Court said:

> ". . . However, as a consequence of the territorial limitations of state power, the Due Process Clause of the Fourteenth Amendment limits the judicial power of the states. Hanson v. Denckla, 357 U.S. 235, 249-251, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); Pennoyer v. Neff, 5 Otto 714, 95 U.S. 714, 24 L.Ed. 565 (1878). Simply put, a state court cannot exercise binding jurisdiction over persons residing outside its boundaries unless there is some reasonable basis for doing so. A state court does not have jurisdiction over, and therefore cannot bind to a judgment, an individual with whom the state has no 'contacts, ties or relations.' International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945); accord, Hanson v. Denckla, supra, 357 U.S. at 251, 78 S.Ct. 1228; Note, 'Multistate Consumer Class Actions,' 25 Hasting L.J. 1411 (1974); Note, 'Expanding the Impact of State Court Class Action Adjudications,' 18 U.C.L.A. L.Rev. 1002 (1971). . . ." 143 N.J. Su. 84, 362 A.2d 1179-80.

The law with respect to the application of the Due Process Clause of the United States Constitution in class actions must be uniform in all fifty states; otherwise, a most unseemly rash of "forum shopping" certainly will result.[12] The firm supervisory hand of this Court should be exercised to prevent this abuse. Indeed, this Court, in *Shaffer* v. *Heitner*, supra, extended the safeguards of the Due Process Clause as to *in rem* and *quasi in rem* actions.

> ". . . This recognition leads to the conclusion that in order to justify an exercise of jurisdiction in rem, the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing.' The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum contacts standard elucidated in International Shoe." (Footnotes omitted). ..... U.S. ....., 53 L.Ed.2d 699-700, 97 S.Ct. 2581-2.

Inasmuch as a judgment pursuant to the Kansas class action statute binds all members of the class, whether it be favorable or unfavorable (K.S.A. 60-223(c)(2), App. E, pp. A86-A87), the existence of jurisdiction must be tested in the context of an unfavorable judgment. If, as appears to be inevitable, Petitioners are to be deprived of the benefits of a judgment in their favor and against the

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12. In an effort to alleviate this problem the National Conference of Commissioners on Uniform State Laws recently adopted and sent to the American Bar Association's House of Delegates a Uniform Class Action [Act] [Rule] which deals with jurisdiction over both plaintiffs and defendants. The Chairman, Allan Vestal, in explaining Section 6, states that ". . . in the case of a plaintiff class, that jurisdiction will turn on (1) sufficient minimum contacts between class members and the state and (2) state provisions allowing service had the members of the plaintiff class been defendants in the suit." American Bar Association Journal, June, 1977, p. 838.

class or a member or members thereof, Petitioners' right to constitutional due process will have been violated.

Compounding the error of the Kansas Court is the obvious effect of the following unusual provision of the Kansas statute:

> ". . . In any class action maintained under subdivision (b)(3), the court shall exclude those members who, by a date to be specified, request exclusion, *unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor. . . .*" (Emphasis supplied). K.S.A. 60-223(c)(2).

This provision is included in a statute otherwise conforming closely to Federal Rule of Civil Procedure 23 (App. E, pp. A90-A91). The effective result is to foreclose to the nonresident, no-contact plaintiff class member his last clear chance to avoid unwilling submission to the Kansas Courts. Where then are his constitutional rights to due process under the Fourteenth Amendment? Conversely, Petitioners' Fourteenth Amendment rights are violated because any judgment rendered will not be entitled to full faith and credit in the courts of other states, since the putative class member has no absolute right to "opt out".

There Was No Common Fund Which Might Serve As a Basis for Jurisdiction.

Inasmuch as *Shutts* was held to be controlling of the decision in the instant case, we now analyse the position there adopted by the Kansas Supreme Court.

In apparent recognition of its tenuous position in asserting jurisdiction over nonresident, no-contact members

of the alleged plaintiff class, the Kansas Supreme Court in *Shutts* attempted to relate this case to the common fund cases.[13] All of these cases involved a fund of money within the state exercising jurisdiction, in which fund the plaintiffs claimed a joint or common ownership and possessed some "mutuality of interest." The cases also involved fraternal societies or insurance companies organized in the state which exercised jurisdiction and in each instance the control and regulation of the company or society was of vital interest to the state of its organization. Moreover, in each instance, the nonresident policyholders had purchased policies, thereby establishing contact with the home state of the insurance company. The Kansas Court speaks repeatedly of "suspense royalties" (which supposedly constituted the common fund) and makes the erroneous statement that:

> ". . . The 'suspense royalties' in question never did or could belong to Phillips [Petitioner]. . . ." 222 Kan. 552, 567 P.2d 1311 (App. B, pp. A48).

Contrary to the conclusion of the Kansas Supreme Court, the members of the plaintiff class, being lessors, had no ownership rights in the gas produced and, therefore, there will be no "suspense royalties." The leases provide for a delivery to the lessor of a fraction of all oil produced as royalty. But, this is not so with respect to gas produced. The royalty on gas is not payable in kind as is oil royalty. Rather, the leases require a payment in money measured by proceeds from or value of

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13. *Hartford Life Ins. Co.* v. *Ibs*, 237 U.S. 662 (1915); *Carpenter* v. *Pacific Mutual Life Insurance Co.*, 10 Cal.2d 307, 74 P.2d 761 (1937); aff'd *sub nom. Neblett* v. *Carpenter*, 305 U.S. 297 (1938), reh. den. 305 U.S. 675 (1939); *Royal Arcanum* v. *Green*, 237 U.S. 531 (1915); *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U.S. 356 (1921).

the gas produced and sold by lessee. This results in a debtor-creditor relationship pursuant to a contract (lease agreement) and no fund exists.

The relationship is clearly explained in *Greenshields* v. *Warren Petroleum Corp.*, 248 F.2d 61 (10 Cir. 1957), cert. den. 355 U.S. 907 (1957). There, Greenshields, the lessor, maintained that, though he had executed an oil and gas lease, because he had not signed a submitted stipulation of interest (in the nature of a division order) there had been no transfer of title to the gas. He sued his lessee for conversion of the gas. Judge Lewis, speaking for a unanimous panel of the United States Court of Appeals for the Tenth Circuit, rejected the lessor's claim. The Court said:

> ". . . It is well settled that the provision concerning the payment for gas operates to divest the lessor of his right to obtain title in himself by reduction to possession and that thereafter his claim must be based upon the contract with the one to whom he has granted that right. His claim can only be for a payment in money and not for the product itself. Mussellem v. Magnolia Petroleum Co., 107 Okl. 183, 231 P. 526; American Oil & Refining Co. v. Cornish, 173 Okl. 470, 49 P.2d 81; United States v. Stanolind Crude Oil Purchasing Co., 10 Cir., 113 F.2d 194. The transfer from the lessors was as contemplated by their leases and effectively passed title to the lessees." 248 F.2d 67.

In its rationale the Kansas Court has turned its back on its own decision in *Waechter, et al.* v. *Amoco*, 217 Kan. 489, 537 P.2d 228 (1975), where it held:

> ". . . We know of no precedent to the effect stated therein nor of any reason why an oil and gas lessee

> should be declared a fiduciary. It seems well established that a lessee under an oil and gas lease is not a fiduciary to his lessor; his duty is to act honestly and fairly under a contractual relationship (Bunger v. Rogers, 188 Okla. 620, 112 P.2d 361). . . ." 217 Kan. 510.

Moreover, the Kansas Court's statements are in direct conflict with the consistent position of the royalty owners (who compose the alleged plaintiff class) that they have no gas to sell, thereby admitting they have no interest in the proceeds accumulated during periods of suspension, pending FPC approval of rate increases, since all of the monies are attributable to the sale of lessee's gas. This was the conclusion reached by the United States Court of Appeals for the District of Columbia Circuit in *Mobil Oil Corporation* v. *Federal Power Commission.*[14]

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14. 463 F.2d 256 (1972), cert. den. 406 U.S. 976, reh. den. 409 U.S. 903 (1972). At 463 F.2d 259-60, the Court stated:

> "We have no need to pursue the intricacies of oil-and-gas law, or to take note of the way in which state law concepts vary in describing the interests created by oil and gas leases.[9] It suffices for this case that generally the royalty owner is not considered, either in common parlance or in conceptions of state law decisions, to be engaged in any 'sale' of gas.[10] As to state law we refer to Judge Brown's discussion in Huber.[11] [*J. M. Huber Corp.* v. *Denman*, 367 F.2d 104 (5th Cir. 1966)] The lease terms give the lessee all possessory interests in gas produced during the life of the lease, including full right of sale.
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> "11. See 367 F.2d at 113-114:
>
> " '[The lessors make] the very simple, yet profound, contention that there can be no "sale" of gas by royalty owners since they have no gas to sell. And this seems to be true as a matter of oil and gas law, whether based on the ownership-in-place concept followed by Texas and others or on non-ownership theories of other jurisdictions. For all agree that as the gas leaves the well-mouth, the entire ownership of the gas is in the lessee, none being reserved in the lessor.' "

[463 F.2d 259-60, Footnotes 9 and 10 and the last paragraph of footnote 11 omitted.]

In short, the entire ownership of natural gas produced and the monies derived from the sale thereof is in the lessee, whose only obligation is to pay his lessor a sum computed by reference to volumes produced and sold, and price. No "suspense royalty" fund is or can be created. Each legitimate member of the plaintiff class has a creditor's claim against his lessee, and no more.

It follows that the Kansas Court's attempt to find support for its claim to jurisdiction in the "common fund" cases must fail for lack of a fund.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Kansas.

Respectfully submitted,

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APPENDIX

APPENDIX A

Nix and Schupbach v. Northern Natural Gas Producing Co.

No. 48,470

HAZEL NIX and FRED SCHUPBACH, JR., individually and as representative of all that class of gas royalty owners under Northern Natural Gas Producing Company and Mobil Oil Corporation oil and gas leases in the Hugoton-Anadarko area, *Appellees* and *Cross-Appellants,* v. NORTHERN NATURAL GAS PRODUCING COMPANY and MOBIL OIL CORPORATION, *Appellants* and *Cross-Appellees.*

SYLLABUS BY THE COURT

1. OIL AND GAS—*"Suspense" Royalty Interest—Class Action—Unjust Enrichment—Judgment of Interest Computation Modified.* In an action by royalty owners against their producer for interest on royalties held in "suspense," it is *held*: The trial court's judgment is affirmed as to (1) the certification of the plaintiff class action, (2) its determination that the gas producers were liable for interest on the theory of unjust enrichment, and (3) its determination that the class members had not waived any claim for interest. The trial court's judgment is modified as to the computation of the interest to be recovered. (Following *Shutts, Executor v. Phillips Petroleum Co.,* 222 Kan. ....., ... P.2d .....)

2. PLEADINGS—*Amended Pleadings—Relate Back to Date Of Original.* Under K.S.A. 60-215(c) whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading, and an amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and other conditions of the statute are satisfied.

Appeal from Grant district court; KEATON G. DUCKWORTH, judge. Opinion filed July 29, 1977. Affirmed in part, modified in part and remanded for further proceedings.

Richard Jones, of Hershberger, Patterson, Jones & Roth, of Wichita, argued the cause, and *Jack D. Sage,* of the same firm, and *Roscoe C. Elmore,* of Mobil Oil Corporation, of Houston, Texas, were with him on the briefs for the appellants and cross-appellees.

Alan C. Goering, of Chapin & Penny, of Medicine Lodge, argued the cause, and *W. Luke Chapin,* of the same firm, and *Gary Hathaway,* of Hathaway & Kimball, of Ulysses, were with him on the brief for the appellees and cross-appellants.

The opinion of the court was delivered by

SCHROEDER, J.: This is a class action brought by Hazel Nix and Fred Schupbach, Jr., (plaintiffs-appellees and cross-appellants) individually and on behalf of some 5,739 gas royalty owners, including those who do not reside in Kansas or have leases covering land in Kansas or both, against their producers, Northern Natural Gas Producing Company and Mobil Oil Corporation (Defendants-appellants and cross-appellees), for recovery of interest on "suspense royalties." The total amount of suspense royalties held from 1967 by Mobil and 1968 by Northern to May 1971 was approximately $1,250,000 by Mobil and approximately $223,000 by Northern, which both Mobil and Northern commingled with other funds and used in their business operations. Except for the size of the class membership, the starting of withholding in 1967 by Mobil and 1968 by Northern, the payout by both Mobil and Northern in May 1971, the judgment of the trial court on January 8, 1976, and a statute of limitations question hereinafter discussed, this case is identical in legal issues and factual situations to those presented in *Shutts, Executor v. Phillips Petroleum Co.*, 222 Kan. ....., ... P.2d ..... (No. 47,917, decided July 11, 1977). The same FPC Hugoton-Anadarko area and FPC Opinion No. 586 are involved.

This action was originally commenced on January 24, 1974, by filing a petition which alleged "Mobil Oil Corporation pays royalties on leases of Northern Natural Gas Producing Company, and Plaintiff is informed that Mobil Gas [Oil] Corporation has some interest in Northern Natural Gas Producing Company or its leases. Northern Natural Gas Producing Company is commonly referred to as 'Northern Natural' and for convenience, both defendants are referred to as 'Northern Natural' in this Petition."

The original petition was filed by Hazel Nix, individually and as representative of a class "composed of all of the owners of royalty interests in oil and gas leases in an area known as the Hugoton-Anadarko Area who have had increased proceeds from the sale of their gas withheld by Northern Natural [Gas Producing Company]." The trial court found the appellees were members and proper representatives of a class of royalty owners entitled to "suspense royalties" in the Hugoton-Anadarko

area affected by FPC Opinion 586 under leases owned by Northern Natural Gas Producing Company or Mobil Oil Corporation or any of their predecessor companies. The trial court excluded the royalty owners that opted-out and others that had individual actions pending against the defendants or their predecessor companies from the plaintiff class.

The trial court found Northern Natural Gas Producing Company to be a wholly owned subsidiary of Mobil Oil Corporation.

Attorneys for the parties agreed to add Fred Schupbach, Jr., as a party plaintiff in accordance with the terms and provisions of an amended petition. The agreement is recited in an order filed May 24, 1974, (dated May 22, 1974) which allowed the filing of an amended petition. The order recited, among other things, that the defendants were given 30 days from the date of the order to file amended answers and amended supplemental answers to interrogatories and requests for admissions in conformity to the amended petition. The defendants complied and filed their answers to the amended petition on June 24, 1974.

The record discloses the amended petition was not *filed* until June 13, 1974. Three years from the date of mailing the FPC suspense royalty checks was May 25, 1974.

Upon the foregoing, Mobil contends the three-year statute of limitations is applicable to the appellees' claims, and, therefore, the claims of Mobil royalty owners, first asserted more than three years after appellees' alleged cause of action accrued, are barred.

The trial court found that "Since the petition herein was filed January 24, 1974, not even the implied contract

statute of limitations of three years in Kansas and Oklahoma (and four years in Texas) has run and the court finds the written contract limitation should apply."

Assuming the three-year statute of limitations to be the applicable time limitation for consideration, as Mobil contends, we do not think the claims of Mobil royalty owners are barred. The original petition filed January 24, 1974, referred to both defendants, Mobil and Northern Natural, as "Northern Natural." Both defendants had ample notice prior to the running of any statute of the contents of the amended petition. By agreement of the parties an order was entered by the trial court prior to the running of the statute on May 24, 1974, allowing the amended petition to be filed. The claim against Mobil and Northern Natural arose out of the same facts as alleged in the original petition. The defendants admitted in their answer to the amended petition that "Mobil Oil Corporation pays royalties on leases of Northern Natural Gas Producing Company" and that Northern Natural Gas Producing Company is a wholly owned subsidiary of Mobil. It was stipulated in the pretrial order that Mobil receives all proceeds from gas sales due Northern Natural Gas Producing Company.

Under these circumstances the plaintiff Nix, although a royalty owner under a lease with Northern Natural, had the same standing to seek recovery against Mobil as did the plaintiff Schupbach for damages payable as interest arising from the use of FPC suspense funds. The question presented was common to all class plaintiffs regardless of which defendant's lease was applicable.

K.S.A. 60-215(*c*) provides:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction,

or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he would not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him."

Under all of the facts and circumstances here presented, and applying the intent and spirit of the foregoing statute, the amended petition relates back to January 24, 1974, both as to plaintiff Nix as being a proper representative of the entire class of Mobil's and Northern Natural's royalty owners and as to plaintiff Schupbach as being such representative.

Accordingly, as held in *Shutts,* (1) this action was properly tried as a class action even though involving nonresident plaintiffs, (2) the producers were liable for interest on a theory of unjust enrichment and contractual principles, and (3) the class members had not waived any claim for interest. However, the computation of the award of interest by the trial court should be modified to conform to the *Shutts* case which held:

> "We therefore hold on equitable principles Phillips is required to pay its royalty owners herein seven percent (7%) per annum simple interest on suspense royalties from the date of receipt of suspense royalties by Phillips until October 1, 1970 (the effective date

of FPC Opinion No. 586), and eight percent (8%) simple interest per annum thereafter until the payout to the royalty owners on or about December 7, 1972. Applying the 'United States Rule' on partial payments, after the payout there was still an unpaid principal sum due equal to the total principal due plus accrued interest, less the payout. Assuming proper calculations, this amount, although principal, would equal the accrued interest on the date of the payout. From December 7, 1972, on until the date of judgment (July 29, 1976) equitable principles and Phillips' contractual undertaking require Phillips to pay its royalty owners herein eight percent (8%) per annum simple interest on the unpaid principal sum (accrued interest on date of payout) plus the unpaid principal sum; and thereafter our post-judgment interest statute, K.S.A. 16-204, requires payment of eight percent (8%) per annum simple interest for the benefit of the royalty owners on the total amount of the judgment until paid."

The judgment of the lower court is affirmed in part and modified in part, and the case is remanded for further proceedings consistent with the foregoing opinion.

APPENDIX B

JULY TERM, 1977

PRESENT

HON. HAROLD R. FATZER, CHIEF JUSTICE

HON. ALFRED G. SCHROEDER,
HON. ROBERT H. KAUL,
HON. ALEX M. FROMME,
HON. PERRY L. OWSLEY,
HON. DAVID PRAGER,
HON. ROBERT H. MILLER,
JUSTICES.

No. 47,917

IRL SHUTTS, as Executor of the Estate of Althea Shutts, Individually, and as a representative of all that class of gas royalty owners under Phillips Petroleum Company oil and gas leases in the Hugoton-Anadarko area, *Appellee* and *Cross-Appellant*, v. PHILLIPS PETROLEUM COMPANY, *Appellant* and *Cross-Appellee*.

SYLLABUS BY THE COURT

1. COURTS—*In Personam Jurisdiction over Nonresident Defendants—Minimum Contacts—Jurisdiction over Nonresident Plaintiff Class Members—Due Process.* While the essential element to establish *in personam* jurisdiction over nonresident defendants is some "minimum contacts" between the defendant and the forum

state, the element necessary to the exercise of jurisdiction over nonresident plaintiff class members is procedural due process.

2. PARTIES—*Class Action Exception to Rule—Parties Not Joined Must Be Adequately Represented.* Although the general rule is that only persons subject to a court's jurisdiction are bound by its judgment, there is a recognized exception for suits of a representative character, where those members of the class who are not joined as parties are adequately represented to protect their interest.

3. CLASS ACTIONS—*Need for Class Actions Stated.* In its present form the Kansas Class Action Rule, modeled after the Federal Rule of Civil Procedure 23, is K.S.A. 60-223 and reveals a recognition of the need for permitting actions to be brought by a named plaintiff in a representative capacity.

4. PARTIES—*Prerequisites to Class Action Stated.* The prerequisites to a class action are specified in K.S.A. 60-223(*a*) which provides that one or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

5. SAME—*When Class Actions Maintainable.* Class actions are maintainable under K.S.A. 60-223(*b*)(3) if the prerequisites of subdivision (*a*) are satisfied and in addition the court finds that the questions of law or fact common to the members of the class predomi-

nate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

6. VENUE—*Venue is Procedural Not Jurisdictional.* Venue is not a jurisdictional matter but a procedural one, where real property is only incidentally affected and the action is transitory in nature.

7. CLASS ACTIONS—*Jurisdiction Over Nonresident Plaintiffs—Due Process.* Under K.S.A. 60-223 Kansas courts can exercise jurisdiction over nonresident plaintiffs in a class action if procedural due process guarantees are met.

8. PARTIES—*Class Action—Must Extend to the Members of the Class.* Under K.S.A. 60-223(*c*)(2) the judgment in an action maintained as a class action is required to extend by its terms to the members of the class, as defined, whether or not the judgment is favorable to them.

9. CLASS ACTIONS—*Plaintiff Class Action Binding on Nonresident Plaintiffs—Due Process.* Many cases, and subsequent actions in the context of giving full faith and credit to the prior decisions of other state courts, clearly recognize a plaintiff class action may be binding on nonresident plaintiffs when a "common fund" is involved and where due process requirements are met.

10. CORPORATIONS—*Stakeholder Who Commingles Funds—Common Fund Rule.* When a stakeholder commingles funds, which would otherwise be "common funds" with its other cash, and uses the funds to fulfill its business obligations, where such funds never did or could belong to the stakeholder, the case is embraced within the "common fund" rule.

11. CLASS ACTIONS—*Notice to Class Members.* The notice which must be given to class members in a class action is set forth in K.S.A. 60-223(*c*)(2) and provides: ". . . To afford members of the class an opportunity to request exclusion, the court shall direct that reasonable notice be given to the class, including specific notice to each member known to be engaged in a separate suit on the same subject matter with the party opposed to the class."

12. SAME—*Further Notice—What Court May Require.* In the conduct of a class action further notice is authorized under K.S.A. 60-223(*d*)(2) which provides: "In the conduct of actions to which this section applies, the court may, without limitation, make appropriate orders: . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action. . . ."

13. CLASS ACTIONS—*Rules Permit Members to "Opt-Out" Upon Notice—Requesting Exclusion.* Both the federal rules and Kansas rules regarding class actions permit members of a class to "opt-out" upon receiving the required notice, and under K.S.A. 60-223(*c*)(2) the court shall exclude those members who, *by a date to be specified,* request exclusion, unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor.

14. SAME—*Nonresident Plaintiffs—Reasonable Notice Given—Jurisdictional and Constitutional Due Process Requirements Satisfied.* In a review of the record on appeal involving a plaintiff class action which includes nonresident plaintiffs, it is *held:* The plaintiff class members were given reasonable notice which satisfies jurisdictional and constitutional due process requirements.

15. SAME—*Theory of Class Action—Interest of Absent Class Members Not Represented—Notice to Absent Members Important—Due Process.* The class action is premised on the theory that members of the class who are not before the court can justly be bound because the self-interest of their representative coincides with the interest of the members of the class and will assure adequate litigation of the common issues. Where the interests of absent class members have not been adequately represented, binding them by the class judgment would seem to offend the requirements of due process. Notice to absent members of the class in this regard is particularly important, for it is the greatest single safeguard against inadequate representation.

16. SAME—*Court By Statute Can Make Orders Protecting Members of Class—Notice as Court May Direct.* The provisions of K.S.A. 60-223(*d*) authorize the court to make appropriate orders for the protection of the members of the class or otherwise for the fair conduct of the action. It provides that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present

claims or defenses, or otherwise to come into the action. K.S.A. 60-223(*e*), which authorizes the court to control dismissals and compromises, assists in assuring that absent class members are adequately represented.

17. SAME—*Inadequate Representation Established—Res Judicata Effect Denied to Class Action.* Where inadequate representation is established, courts have denied *res judicata* effect to class action judgments.

18. SAME—*Certifying Class Action—What Trial Judge Should Consider.* Before a class action is certified the trial judge should consider concepts of manageability in terms of our Kansas class action statute, the nature of the controversy and the relief sought, the interest of Kansas in having the matter determined, and the class size and complexity. A court should also give careful consideration to any possible conflict of law problems.

19. EQUITY—*Doctrine of Unjust Enrichment Stated.* The doctrine of unjust enrichment prevents one from profiting or enriching himself at the expense of another contrary to equity. But there must be some specific legal principle or situation which equity has established or recognized to bring a case within the scope of the doctrine.

20. SAME—*Party Making Use of Anothers Money—Interest Must Be Paid on Money Used.* Where a party retains and makes actual use of money belonging to another, equitable principles require that it pay interest on the money so retained and used.

21. INTEREST—*Interest on Suspended Royalties Recoverable—Period of Time Used by Producer.* In an action by royalty owners against their producer for interest on royalties held in "suspense," pending determina-

tion of lawful rates by the Federal Power Commission upon application of the producer for increased rates, it is held that interest on suspended royalties may be recovered for the period of time such royalties remained in the control of, and were available for use by, the gas producer during the pendency of FPC proceedings and related litigation regarding the determination of applicable lawful rates for gas sales, and litigation regarding the determination of issues involved in this appeal, all as more particularly set forth in the opinion.

22. OIL AND GAS—*Gas Producer Agrees to Pay Interest on FPC Suspense Money—Interest on Gas Purchaser's Share—Equity Requires Royalty to Receive Same Treatment.* Where a gas producer, under circumstances described in the foregoing syllabus, files a corporate undertaking with the Federal Power Commission, wherein it *agrees* to pay 7% interest on "FPC suspense monies" until rate proceedings are determined by the commission, and 8% thereafter on the gas purchasers' share of the "impounded" money, in the event the commission orders a refund, equitable principles require that the royalty owners receive the same treatment as to their share, all as more particularly set forth in the opinion.

23. SAME—*Lessee Not to Impose Burdensome Conditions on Royalty Owner—Failure of Royalty Owners to Comply With Conditions—No Waiver to Claim to Interest on Suspense Royalties Used by Lessee—Estoppel.* Where the lessee gas producer has expressly contracted to pay a percentage of the *price received* for the sale of gas on which month-by-month payments to royalty owners were to be based, and the amount received by the lessee for the sale of gas

in excess of the established rates pending FPC determination, although subject to possible refund, was not contractually excluded from the *price received*, the lessee is in no position to unilaterally impose burdensome conditions upon the royalty owners precedent to fulfilling its contractual commitment, albeit permissive until final FPC approval of rate increase applications; and the failure of the royalty owners to comply with these conditions precedent to payment of royalty in excess of the established rates does not constitute a waiver of their claim to interest on "suspense royalties," held and used by their lessee, or operate as an estoppel.

24. INTEREST—*U.S. Rule—Applying Partial Payments to Interest-bearing Debt—First to Interest Due.* The "United States Rule" approved by this court provides that in applying partial payments to an interest-bearing debt which is due, in the absence of an agreement or statute to the contrary, the payment should first be applied to the interest due.

25. OIL AND GAS—*Judgment of Trial Court Affirmed—As to Certification of the Plaintiff Class Action—Interest Claim Not Waived—Determining Gas Producer Liable for Interest—Trial Court's Judgment Modified as to Computation of Interest.* In an action by royalty owners against their producer for interest on royalties held in "suspense," it is *held*: The trial court's judgment is affirmed as to (1) the certification of the plaintiff class action, (2) its determination that the class members had not waived any claim for interest, and (3) its determination that the gas producer was liable for interest on the theory of unjust enrichment. The trial court's judgment is modified as to the computation of the interest to be recovered.

Appeal from Kiowa district court; KEATON G. DUCKWORTH, judge. Opinion filed July 11, 1977. Affirmed in part, modified in part and remanded for further proceedings.

Joseph W. Kennedy, of Morris, Laing, Evans, Brock & Kennedy, Chtd., of Wichita, argued the cause, and *T. L. Cubbage, II,* of Phillips Petroleum Company, of Amarillo, Texas, was with him on the briefs for the appellant and cross-appellee.

W. Luke Chapin, of Chapin & Penny, of Medicine Lodge, argued the cause, and *Alan C. Goering,* of the same firm, was with him on the brief for the appellee and cross-appellant.

The opinion of the court was delivered by

SCHROEDER, J.: This is a class action suit filed against Phillips Petroleum Company seeking to recover interest on "suspense royalties" attributed to gas produced from leases in the three-state Hugoton-Anadarko area during the nine-year period from June 1961, to October 1970. Phillips Petroleum Company finally paid what it termed "suspense royalties" without interest in December 1972, after the Federal Power Commission (FPC) approved certain of Phillips' pending gas price rate increase applications. The trial court determined (1) the matter could be tried as a class action, (2) the class members had not waived any claim for interest, (3) that Phillips was liable for interest on a theory of unjust enrichment, and (4) the class should be awarded six percent compound interest. Phillips Petroleum Company has appealed and the class has cross-appealed asserting the points hereinafter considered and determined.

Irl Shutts (plaintiff-appellee and cross-appellant), a resident of Sun City, Kansas, is the executor of the estate

of Althea Shutts, and a royalty owner under producing oil and gas leases owned by Phillips Petroleum Company (defendant-appellant and cross-appellee) (hereafter Phillips) in the Hugoton-Anadarko area. Shutts or his predecessor in title, Althea Shutts, received certain of the "FPC suspense money," so-called, paid out as royalties by Phillips as hereinafter set forth. The trial court certified Shutts as a member and proper representative of a class of approximately 6,400 gas royalty owners (less a small number of such royalty owners who have opted-out after having received notice given by publication and mailing according to order of the court) who received retained funds paid out as royalties by Phillips as a result of Federal Power Commission Opinion No. 586, issued September 18, 1970, by the Commission and which became final October 28, 1972, determining the lawful gas rates in the Hugoton-Anadarko area rate proceedings. (*In re Hugoton-Anadarko Area Rate Case,* 466 F.2d 974 [9th Cir. 1972].)

During her lifetime, Althea Shutts, a resident of Kansas, owned one-seventh (1/7) of the lessor's interest in two oil and gas leases covering lands in Oklahoma and Texas. These leases were within the Federal Power Commission's rate-making area known as the "Hugoton-Anadarko area" which encompasses all of the State of Kansas and the panhandle sections of Texas and Oklahoma. (See 18 C.F.R. § 154.106[g].) The lessee's interest in Althea Shutts' two leases was owned by Phillips Petroleum Company which operated five producing gas wells.

On each of these two leases, Althea Shutts' predecessor in title had entered into a *gas royalty agreement* with Phillips which has remained in full force and effect and which provides that the royalty paid to the lessor shall be computed in relation to the weighted average price per Mcf *received* by Phillips during any calendar month

from all sales of gas delivered by Phillips within a certain "designated area."

On June 7, 1954, in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 98 L.Ed. 1035, 74 S.Ct. 794, it was determined that Phillips, as an independent natural gas producer selling gas to interstate pipeline companies for interstate transportation and resale, was a "natural gas company" within the Natural Gas Act. (15 U.S.C. § 717, *et seq.*) Accordingly, such sales of gas by Phillips were subject to regulation by the Federal Power Commission (hereafter FPC). By various orders issued since that decision, the FPC *has suspended increases in prices for sales* of gas by Phillips *and has permitted such increases to be collected* at some date subsequent to the original date proposed by Phillips, only upon Phillips' filing with the Commission *a corporate undertaking to refund any or all portions of such increase* which the FPC might find not to have been justified. This corporate undertaking cost Phillips nothing to obtain. *Phillips chose to collect the higher rate,* subject to possible refund, because increases in gas sales prices not made effective subject to FPC approval could not be made retroactive. *Phillips filed the required corporate undertaking to refund the "FPC suspense money."*

After June 7, 1954, Phillips sold gas in the "designated area" and throughout the Hugoton-Anadarko area. Some of this gas was sold subject to the FPC jurisdiction at prices which had not been approved by the FPC. *The increased prices for some,* but not all, of Phillips' gas sales in the "designated area" and the Hugoton-Anadarko area *were collected by Phillips subject to a duty to refund the same to the gas purchasers* in the event the FPC failed to approve the sales prices pursuant to Section 4(e) of the Natural Gas Act, 15 U.S.C. § 717c(e), *with interest*

at seven percent (7%) per annum from the date of receipt until September 18, 1970, and eight percent (8%) per annum thereafter until paid out, if the FPC did not approve the sales price. (18 C.F.R. § 154.102[c] and FPC Opinion No. 586, p. 33.) Until such time as the FPC approved such increased sales prices, or a portion of such prices, Phillips was entitled to retain the proceeds from such sales under federal cases holding that the royalty owners had no legally enforceable right to obtain such monies held by Phillips subject to refund. (See *Ashland Oil & Refining Company v. Staats, Inc.*, 271 F. Supp. 571, 579 [D. Kan. 1967]; and *Boutte v. Chevron Oil Company*, 316 F. Supp. 524 [E.D. La. 1970], aff'd 442 F.2d 1337 [5th Cir. 1971].)

Until June 1, 1961, Phillips in its monthly payments to its gas royalty owners in the Hugoton-Anadarko area paid all of their share of the increased rates being collected by Phillips subject to refund, as well as their share of proceeds from the sale of gas which were not subject to refund, the so-called "firm" proceeds. *Beginning June 1, 1961, Phillips' management decided to begin withholding all of its royalty owners' share of increased gas prices subject to refund, unless the royalty owners put up an acceptable indemnity to repay the same with interest if the increased prices were not approved by the FPC.*

In July 1961, Phillips gave the following notice to Althea Shutts and all other royalty owners in the Hugoton-Anadarko area:

"NOTICE

"As you probably know, since June, 1954, all sales of gas to the interstate pipelines have been subject to the control of the Federal Power Commission. Phillips has been successful since that time in securing

a number of increases in its contract prices, but these could not be placed into effect until they were approved, after investigation and hearing, by the Federal Power Commission, *except by the agreement of Phillips to refund to the purchaser, with appropriate interest, such amounts that are not finally allowed by the Commission.* Heretofore, Phillips Petroleum Company has voluntarily computed royalties paid you *on the basis of a weighted average price* which included total proceeds received in the area, without regard to the possibility of future refunds. This practice can no longer be continued. Effective June 1, 1961, and until further notice, royalties paid you will be computed by excluding that portion of any price being collected subject to refund which exceeds 11 [cents] per Mcf (presently the maximum area price level for increased rates as recently announced by the Federal Power Commission in its Statement of General Policy). Payment of royalty based on the balance of the sums collected will be made at such time as it is determined that the sums collected are no longer subject to refund.

"Interest owners desiring to receive payments computed currently on the full sums being collected may arrange to do so by furnishing Phillips Petroleum Company acceptable indemnity to cover their proportionate part of any required refunds, plus the required interest.

"Phillips Petroleum Company
Natural Gas Department
Bartlesville, Oklahoma"

(Emphasis added.)

The indemnity which Phillips required was not a no-cost corporate undertaking, which was all Phillips filed with the FPC. Rather, Phillips required a corporate surety bond in an amount based on estimated production for two years, *plus seven percent (7%) interest*, subject to Phillips' review at the end of eighteen (18) months.

This notice was included with Phillips' royalty checks for June 1961, that were mailed to all its royalty owners on July 28, 1961. Seventeen (17) persons or entities (who are not members of this class action) did furnish indemnities acceptable to Phillips and received current payments computed on the full sums being collected, including amounts subject to refund. However, none of the approximately 6,400 class members responded to Phillips' offer contained in the notice, or requested that they be allowed to furnish Phillips with acceptable indemnity, so that they might be paid otherwise than according to the method outlined in Phillips' July 28, 1961, notice.

At various times after May 20, 1960, Phillips had nineteen (19) applications before the FPC requesting permission to increase the price for sales of gas by it within the "designated area." In due course the FPC issued orders suspending the nineteen (19) rate increase applications. On November 27, 1963, the FPC consolidated the applications of Phillips and others for hearing in the Hugoton-Anadarko area rate proceeding.

From June 1, 1961, to October 1, 1970, Phillips deposited the increased rate monies collected *in its general account and commingled it with its other funds*, without ever giving notice of this fact to royalty owners during the time it was holding money. It is important to note that during this period of time *Phillips had no entitlement to the gas royalty owners' share of the "suspense royalties," whether or not the rates were approved by the FPC.*

Phillips never owned this money. While Phillips collected eight-eighths (8/8) of the increased rates, under no condition was the one-eighth (1/8) of the increase attributable to the royalty owners ever to go to Phillips. That royalty share, according to eventual FPC ruling, was either to go to Phillips' royalty owners, or back to Phillips' gas purchasers with interest, or part to one and part to the other.

On September 18, 1970, the FPC issued Opinion No. 586 in the Hugoton-Anadarko rate cases which established sales prices applicable to the gas sales and refund requirements. The order was made effective October 1, 1970. (See 44 FPC 761 and 35 Fed. Reg. 15,986 [1970].) The effect of FPC Opinion No. 586 was to approve the increased rates collected by Phillips from September 1, 1956, to the extent of approximately $152,000,000 in plant sales of gas and approximately $1,000,000 in field or lease sales of gas, and to disapprove rate increases to the extent of approximately $29,000,000 in plant sales of gas and $73,000 in lease sales of gas, the latter amounts being found refundable to the gas purchasers with interest.

However, the FPC had no jurisdiction over landowner royalty interests relating to the sale of gas, and it undertook to make no ruling with reference to whether any interest or compensation was payable by the producers to the royalty owners for "suspense royalties" held by Phillips.

As of October 1, 1970, Phillips again began paying all of the royalty owners, to whom it accounted, royalties including the rate increases as to current monthly royalties, but Phillips did not then pay any back "suspense royalties" on monies previously withheld. On or about November 25, 1970, Phillips sent the following notice to Althea Shutts and other royalty owners in the class:

"NOTICE CONCERNING FEDERAL POWER COMMISSION OPINION NO. 586 COVERING INTERSTATE SALES OF GAS PRODUCED FROM THE HUGOTON-ANADARKO AREA:

"Effective as of October 1, 1970, and until further notice, Phillips Petroleum Company is giving effect to the full ceiling rate levels established by the Federal Power Commission in Opinion No. 586. If the check enclosed herewith includes payment for your interest in properties in the Hugoton-Anadarko Area, you are hereby notified that such payment has been based upon the full ceiling rate levels established by the Opinion.

"If such Opinion should be changed, set aside, or vacated, resulting in a reduction of the rate levels relied upon by Phillips in its calculations, Phillips will expect you to reimburse it in full for any overpayments occasioned thereby. Such recovery may be had, at Phillips' election, by withholding from subsequent payments to you for your interest in oil or gas, or both oil and gas, whether or not produced from the same properties under which the overpayment occurred.

"Your acceptance of the enclosed check will be regarded as evidence of your consent to such recovery.

"Phillips Petroleum Company
Exploration & Production Department
Gas Settlements Division—619 FPB
Bartlesville, Oklahoma 74004"

The foregoing notice from Phillips to Althea Shutts and all class members was included with Phillips' royalty checks for October 1970.

Litigation regarding FPC Opinion No. 586 continued until July 31, 1972, when the Ninth Circuit Court of Appeals affirmed the FPC opinion. When no appeal was taken, the opinion became final on October 28, 1972. (See *In re Hugoton-Anadarko Area Rate Case*, supra.)

On or about December 7, 1972, Phillips mailed royalty checks to royalty owners in payment of the increased royalties due them by virtue of the finality of FPC Opinion No. 586. Phillips paid Althea Shutts the sum of $2,831.25, and paid out approximately $5,700,000 in additional royalties to over 6,400 persons, firms, corporations and entities (which includes the class as defined by the trial court). Only 218 of these persons were residents of Kansas. Of that number only 128 had executed gas royalty agreements of the type under which Althea Shutts' royalty was paid. (See Phillips' July 1961, notice to *all* of its royalty owners in the Hugoton-Anadarko area heretofore quoted as stipulated by the parties herein.) The record is barren as to the number in the plaintiff class residing in other states who have gas leases with Phillips covering land in Kansas, which encompasses the largest portion of the Hugoton-Anadarko area.

At the time of these payouts, Phillips sent the following notice to each payee:

"NOTICE

"The enclosed check covers payment based upon gas proceeds which have heretofore been held in suspense pending determination by the Federal Power Commission of the just and reasonable rates applicable to the Hugoton-Anadarko Area, and, subsequent to issue of Opinion No. 586 of the Federal Power Commission which determined such rates, pending appeal and judicial finality of said Opinion. The decision of the

Circuit Court of Appeals affirming Opinion No. 586 has recently become final.

"*Credits to leases for these heretofore suspended sums have been accrued by computer in suspense accounts, pursuant to numerous Federal Power Commission dockets.* The detailed monthly prices and lease accrual information cannot, therefore, be reflected in any practicable manner on the enclosed check. *The detail of our computations can be audited during regular business hours at our Bartlesville, Oklahoma office.*

"Phillips Petroleum Company
Settlements Division
Exploration & Production Department
Bartlesville, Oklahoma 74004"

(Emphasis added.)

The foregoing notice discloses Phillips neither paid nor offered to pay any interest for the use of the money, nor did Phillips say anything about interest or how long the money had been held or used by Phillips.

Althea Shutts accepted the payment for increased royalties before she died on May 15, 1974. On September 16, 1974, Irl Shutts filed this action. Shutts, as a representative of approximately 6,400 royalty owners, claimed approximately $1,000 interest for himself and interest for the members of the class on the amount ultimately paid to the royalty owners which have heretofore been denominated "suspense royalties."

On November 26, 1974, Shutts filed a motion to certify the action as a class action. On May 1, 1975, Judge Robert M. Baker granted Shutts' motion for a class order under K.S.A. 60-223 and ordered notice to be given to all gas royalty owners in the Hugoton-Anadarko area, regardless of whether such leases covered land in Kansas, Texas

or Oklahoma. Phillips' request to take an interlocutory appeal was denied.

Shutts prepared notices which were distributed by Phillips during a monthly royalty payment mailing to all royalty owners in the Hugoton-Anadarko area then receiving royalties from Phillips. After setting forth the facts surrounding the lawsuit, the notice provided:

> "1. The court will include as members of the plaintiff class herein all of the gas royalty owners addressed above; provided, however, any person or concern so included may by filing a written request to the Clerk of the District Court of Kiowa County, Kansas, Greensburg, Kansas, 67054, on or before the 30th day of April, 1976 [original notice specified July 15, 1975] be excluded from the class unless upon notice and after hearing and for stated reasons the court finds that inclusion is essential to the fair and efficient adjudication of the controversy. Any class member, if he so desires, may appear in the case in person or through his own counsel, otherwise, plaintiff's counsel will represent him as a member of plaintiff class.
>
> "2. Judgment in this action, whether for the plaintiff class or for the defendant, will be binding on all class members except those who may be excluded as above stated. Class members excluded will not be entitled to share in the benefit of any judgment or settlement entered or concluded favorable to plaintiff class.
>
> "3. Plaintiffs' attorneys' fees are contingent on recovery. If the plaintiffs are successful, the court will allow a reasonable attorneys' fee for plaintiffs' attorneys out of the interest fund created. If plaintiffs are unsuccessful, there will be no allowance of attorneys' fees."

Notices were also published in seven area newspapers and sent by first class mail by the plaintiff to former royalty owners. Judge Baker later disqualified himself, and Judge Duckworth was eventually assigned to this case.

On August 12, 1975, three Texas residents mailed a notice to the clerk of the district court saying they did not wish to participate in this class action suit. Because this notice was not timely filed and because a multiplicity of suits could occur if exclusion was granted, the trial court sustained *Phillips' motion* to deny the exclusion.

The trial court adopted by reference the stipulations of the parties set forth in the pretrial order as its findings of fact and concluded (1) the matter could be tried as a class action, (2) the class members had not waived any claim for interest, (3) that Phillips was liable for interest on a theory of unjust enrichment, and (4) the class should be awarded six percent compound interest. Specifically, the trial court determined in its conclusions of law:

> "1. This is a proper class action under the provisions of K.S.A. Supp. 60-223 because:
>
> (a) The approximately 6400 royalty owners in the Hugoton-Anadarko area makes joinder impractable; [sic]
>
> (b) Any interest due each member of the class is too small to justify separate actions;
>
> (c) Questions of fact and law are common to members in that *the facts are really undisputed and the sole legal issue presented is whether the plaintiff members are entitled to interest on the suspended royalties held by defendant;*

(d) The claims of the named parties herein are typical of the claims of all members of the class and will fairly and adequately protect the interest of the class;

(e) The question presented common to all members of the class predominates over any individual question and a class action is not only superior but the only efficient manner to adjudicate the dispute herein (to avoid multiple suits and excessive expenses) *and that this court having jurisdiction of a large physical portion of the Hugoton-Anadarko area is a convenient forum for such action.*

. . .

"4. The defendant concomitant with its duty to its royalty owners to secure the best price obtainable (under its covenant to market) had the duty to remit the collected share of royalty as promptly as commercially feasable [sic] on the same conditions as it was received by defendant or in the alternative to place the funds in a proper investment fund for subsequent disbursement. The fact that FPC permitted and essentially required defendant to post bond and agree to pay back interest if a refund was ordered did not entitle defendant to free use of the royalty owners share of the increased proceeds. The FPC bond and interest pay back requirements certainly justify and permit defendant business use of the increased rates of its own share of those rates but not the royalty owners share which did not belong to defendant under any eventual ruling by the FPC. See *Phillips Petroleum Co. v. Adams*, 513 F2d 355. The Court therefore concludes that the defendant is liable for interest on royalty proceeds retained by

it and used as a business asset by it pending final FPC approval and conclusion of litigation based on its contractual duty to remit royalty proceeds in a reasonably prompt manner. It is specifically not the basis of this decision that such duty arises from an attempt to impose any facet of fiduciary relationship to the defendant.

. . .

"7. The acceptance without an accounting as to rates or interest of payment of the suspended royalties herein in December, 1972, did not constitute ratification because there was no basis for the royalty owners to know what was involved in the payment. For the same reason estoppel does not apply to preclude recovery herein.

"8. Division orders and unitization orders cannot be construed to modify the lease obligations of the defendant, being instruments reflecting royalty owners interests in proceeds from production and unitization of acreage for allowables respectively. No consideration is reflected in these instruments which would support defendant's contention that these instruments, executed subsequent to the original leases herein, were contracts to modify the royalty provisions of said leases. For the same reasons, the gas royalty agreements do not change defendant's obligations under their original leases except for agreements to the controlled price.

"9. Defendant's contention that the payment of the additional royalties in December 1972 constituted a 'bounty' to plaintiffs is without any foundation and is contrary to said 'gas royalty agreements' establishing the FPC approved prices as the basis for royalty payments.

"10. To allow defendant free use of the royalty share of production for over ten years as a result of the difficulties and delays caused by the FPC regulations would unjustly enrich defendants. Defendant paid the full royalty share of proceeds collected prior to June 1, 1961, and after October 1, 1970. The decision to withhold the increased (but unapproved) rates in the intervening period was a unilateral decision by defendant that cannot rise to the stature of a defense of ratification. Nor does it support the 'bounty' theory of defendant herein as noted above.

"11. The statutory rate of interest herein in Kansas, Oklahoma and Texas is six per cent per annum and is allowed as the proper rate of interest to be applied to the suspended royalties herein from time of receipt until date of judgment herein with interest compounded on an annual basis." (Emphasis added.)

Appeal has been duly perfected by Phillips, and a cross-appeal has been taken challenging the amount of interest awarded by the trial court.

The appellant *contends* the trial court erred in holding that it had jurisdiction over *in personam* claims of unnamed nonresident class plaintiffs having no contact with the State of Kansas.

Here the representative of the *plaintiff class* is a resident of Kansas. The named defendant does business in Kansas, and has been duly served with process in Kansas. No question is asserted on this appeal as to the jurisdiction of the trial court over the defendant or the trial court's power to enforce a judgment against the defendant. Two hundred and eighteen *plaintiff class members* are Kansas residents, and an unknown number of the plaintiff members, many of whom reside in other states, have

gas leases with Phillips covering Kansas lands. But it must be conceded some gas leases or other contracts entered into between Phillips and the gas royalty owners in the plaintiff class involve persons who are not residents of Kansas or persons who have gas leases covering land which is outside the physical boundaries of Kansas or both.

It is a basic rule of law that for a person to be bound by a state court's judgment affecting his legal rights, he must be subject to the adjudicating court's jurisdiction. The question presented is how can a Kansas court assert jurisdiction in a *plaintiff class action*, where some of the individual plaintiff class members do not reside in Kansas and do not have land in Kansas covered by leases with Phillips.

It is apparent the multistate class action filed herein presents a novel issue in terms of *in personam* jurisdiction. However, while multistate class actions are novel, state courts have long been confronted with actions brought against nonresident defendants. Out of these cases have developed jurisdictional principles which permit courts to assert personal jurisdiction over a foreign defendant or to obtain jurisdiction over the property of a foreign defendant, and in both cases to render a binding judgment.

The basic requirements to subject *defendants* to personal liability were first established in *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565, where the United States Supreme Court held:

> ". . . The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate

assumption of power, and be resisted as mere abuse. . . ." (p. 720.)

The ruling in *Pennoyer* was expanded and made more flexible by cases examining the "minimum contacts" necessary to exercise *in personam* jurisdiction over a nonresident defendant. (*Internat. Shoe Co. v. Washington,* 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154, 161 A.L.R. 1057; and *McGee v. International Life Ins. Co.,* 355 U.S. 220, 2 L.Ed.2d 223, 78 S.Ct. 199.) *Pennoyer* was also expanded by *quasi in rem* judgments binding a nonresident defendant by the court's exercise of *in rem* jurisdiction over the nonresident defendant's property, thereby subjecting the property to the court's jurisdiction. (Note, Consumer Class Actions with a Multistate Class: A Problem of Jurisdiction, 25 Hastings L. J. 1411, 1426-1428 [1974].)

Recently, in *Hanson v. Denckla,* 357 U.S. 235, 2 L.Ed.2d 1283, 78 S.Ct. 1228, the United States Supreme Court reaffirmed the *Pennoyer* rule in holding that the lower court's exercise of *in personam* jurisdiction over the nonresident defendant was invalid. The United States Supreme Court stated:

> ". . . But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. (Citation omitted.) Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However, minimal the burden of defending in a foreign tribunal, a *defendant* may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him. . . ." (p. 251.) (Emphasis added.)

The most recent case of the United States Supreme Court indicating the parameters of *quasi in rem* jurisdiction over nonresident defendants is *Shaffer v. Heitner,* ..... U.S. ....., ... L.Ed.2d ....., ... S.Ct. ..... [No. 75-1812, decided June 24, 1977], following *Internat. Shoe Co. v. Washington,* supra.

Kansas cases examining and following these jurisdictional requirements over *nonresident defendants* include *Misco-United Supply, Inc. v. Richards of Rockford, Inc.,* 215 Kan. 849, 528 P.2d 1248; *Tilley v. Keller Truck & Implement Corp.,* 200 Kan. 641, 438 P.2d 128; and *Woodring v. Hall,* 200 Kan. 597, 438 P.2d 135.

These cases all deal with nonresident defendants, not nonresident plaintiffs. Whether all *nonresident plaintiffs* in a class action are required to have "minimum contacts" with the forum is a different matter. Because a class action must necessarily proceed in the absence of almost every class member, we hold the residential makeup of the class membership is not controlling. (Note, Consumer Class Actions with a Multistate Class: A Problem of Jurisdiction, *supra* at 1432.) What is important is that the nonresident plaintiffs *be given notice and an opportunity to be heard and that their rights be justly protected by adequate representation.* These are the essential requirements of due process, and they must be satisfied in any class action by every court, state or federal, regardless of the residences of the absent class members. Therefore, while the essential element necessary to establish jurisdiction over nonresident defendants is some "minimum contacts" between the defendant and the forum state, *the element necessary to the exercise of jurisdiction over nonresident plaintiff class members is procedural due process.*

That there is indeed a difference between the *jurisdictional standards* governing class actions, and those govern-

ing all other actions, was emphasized long ago by the United States Supreme Court in *Hansberry v. Lee,* 311 U.S. 32, 85 L.Ed. 22, 61 S.Ct. 115, 132 A.L.R. 741. There the court refused to bind a Negro petitioner to a judgment against him, as a member of a class on the basis of earlier litigation, where a false and fraudulent stipulation was entered into. In that case the court noted:

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Pennoyer v. Neff,* 95 U.S. 714; 1 Freeman on Judgments (5th ed.), § 407. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States, R.S. § 905, 28 U.S.C. § 687, prescribe. . . .
>
> "To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it. . . .
>
> ". . . Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all *because some are not within the jurisdiction* or because their whereabouts is unknown or where if all were made parties to the suit its continued abatement by the death of some would prevent or unduly delay a decree. In such cases where the interests of those not joined are of the same class as the interests of those who

> are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree. . . ." (pp. 40-42.) (Emphasis added.)

Thus, although the general rule is that only persons subject to a court's jurisdiction are bound by its judgment, there is a recognized exception for suits of a representative character. While the United States Supreme Court conceded that the extent of this exception had not been precisely defined by judicial opinion, it went on to suggest that if a class were adequately represented, its interest would be protected and the court could proceed to a final decree. These pronouncements, although pure dicta, would not have been included in the opinion unless they were intended to state the rule regarding class actions. The opinion also foretells what is an essential requisite of due process as to absent plaintiff class members, adequate representation. (See *Gray v. Amoco Production Co.*, 1 Kan. App. 2d ____, 564 P.2d 579 [No. 48,385, decided May 20, 1977].)

An examination of the nature of class action suits provides a historical background for this conclusion. Class action suits arose in equity and were known to English chancery practice since the Seventeenth Century. (A. Homburger, State Class Actions and the Federal Rule, 71 Colum. L. Rev. 609, 611 [1971]; and H. Hunter, Georgia Investment Company v. Norman—The Supreme Court Creates a New Form of Class Action for Georgia, 24 Mercer L. Rev. 447, 448 [1973].)

In the 1853 opinion of *Smith et al v. Swormstedt, et al,* 57 U.S. (16 How.) 288, 14 L.Ed. 942, the United States Supreme Court gave its blessing to the equitable class suit by noting:

"The rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest. . . ." (p. 302.)

In 1938, the Federal Rules of Civil Procedure defined class actions in terms of the abstract nature of the rights involved: the so-called "true" category was defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights related to "specific property"; the "spurious" category, as involving "several" rights affected by a common question and related to common relief. (See Proposed Rules of Civil Procedure, 39 F.R.D. 69, 98 [1966].)

Because of the unworkability of these classifications, the Federal Rules of Civil Procedure were amended in 1966. It was decided the new rules would allow a judgment to bind all class members unless a member affirmatively "opted out" of the litigation at its commencement. (Fed. R. Civ. P. 23 [c] [3].)

Recently the United States Supreme Court has required plaintiffs to assume the cost of notice in common-question class actions. (*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 40 L.Ed.2d 732, 94 S.Ct. 2140.) The United States Supreme Court has also refused to aggregate class action claims to meet the $10,000 federal jurisdictional requirements. (*Zahn v. International Paper Co.*, 414 U.S. 291, 38 L.Ed.2d 511, 94 S.Ct. 505; and *Snyder v. Harris*, 394 U.S. 332, 22 L.Ed.2d 319, 89 S.Ct. 1053, reh. denied 394 U.S. 1025, 23 L.Ed.2d 50, 89 S.Ct. 1622.) While the results are supported by the fear of overloading the federal judicial

system and the desire not to judicially expand the constitutionally established jurisdictional limits, these recent United States Supreme Court cases have clearly restricted access to federal courts. This suit, for example, could not be brought in a federal court. Furthermore, the FPC does not have jurisdiction over the matter. If the state courts will not hear the matter, who will grant relief?

If state courts cannot maintain class action suits with nonresident plaintiffs, can the "small man" find legal redress in our modern society which increasingly exposes people to group injuries for which they are individually unable to get adequate legal redress, either because they do not know enough or because such redress is disproportionately expensive? (See A. Homburger, State Class Actions and the Federal Rule, 71 Colum. L. Rev. 609, 641-643 [1971].)

The appellant argues this action should be brought in several different state courts. This risks inconsistent adjudications for a class which is otherwise treated alike. Furthermore, the statute of limitations has run in Oklahoma and Texas. The United States Supreme Court has held the commencement of a class action suit tolls the applicable statute of limitations as to all members of the class. (*American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 38 L.Ed.2d 713, 94 S.Ct. 756, reh. denied 415 U.S. 952, 39 L.Ed.2d 568, 94 S.Ct. 1477; and *Eisen v. Carlisle & Jacquelin*, supra.) However, if in this action Kansas is without jurisdiction over class plaintiffs in other states, this action would not toll the statute of limitations in those states.

We examine then the Kansas rules regarding class actions. Our statutes reveal a recognition of the need for permitting actions to be brought by a named plaintiff

in a representative capacity. (G.S. 1868, ch. 80, § 38; L. 1909, ch. 182, § 37; R.S. 1923, 60-413; and L. 1963, ch. 303, § 60-223, amended by Supreme Court order dated July 17, 1969.)

In its present form the Kansas Class Action Rule, modeled after the Federal Rule of Civil Procedure 23, is found at K.S.A. 60-223. It gives the prerequisites for a class action as follows:

> "(*a*) *Prerequisites to a class action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> "(*b*) *Class actions maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (*a*) are satisfied, and in addition:
>
> "(1) The prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

> "(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> "(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) The interest of members of the class in prosecuting or defending separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against members of the class; (C) the appropriate place for maintaining, and the procedural measures which may be needed in conducting, a class action."

Phillips argues this is not a proper case for class action treatment under K.S.A. 60-223(*b*)(3) because there are differing questions of law and fact governing the rights which arise under gas leases in three states. Phillips attempts to apply an overly restrictive interpretation of the "commonality" requirement of K.S.A. 60-223(*a*). (*Gray v. Amoco Production Co.*, supra; *Sommers v. Abraham Lincoln Federal Savings & L. Ass'n*, 66 F.R.D. 581 [E.D. Pa. 1975]; and *Fertig v. Blue Cross of Iowa*, 68 F.R.D. 53 [N.D. Iowa 1974].) However, as explained later in this opinion, there are questions of fact and law common to the plaintiff class. (See *Perlman v. First National Bank of Chicago*, 15 Ill. App.3d 784, 305 N.E.2d 236 [1973], appeal dismissed 60 Ill.2d 529, 331 N.E.2d 65.)

Citations to the venue statutes of Kansas and other states are inapplicable here. (See *United States v. Truck-*

ing Employers, Inc., 72 F.R.D. 98 [D.D.C. 1976].) First, venue is not a jurisdictional matter, but a procedural one. (*Gray v. Amoco Production Co.*, supra; and 77 Am. Jur.2d, Venue, § 1, p. 832.) Second, this is a transitory action affecting real property only incidentally. Because this court has *in personam* jurisdiction over the defendant, venue lies in Kiowa County. (*Gray v. Amoco Production Co.*, supra; 20 Am. Jur.2d, Courts, § 121, p. 476-477; and *Farha v. Signal Companies, Inc.*, 216 Kan. 471, 532 P.2d 1330, modified 217 Kan. 43, 535 P.2d 463.) Lastly, if the venue attack is carried to its logical conclusion a class action could not even be maintained in Kansas with Kansas residents because the venue statute would require separate suits in the different counties.

After reviewing K.S.A. 60-223, we hold Kansas courts can exercise jurisdiction over nonresident plaintiffs in a class action if procedural due process guarantees are met. Although no case in Kansas or any other jurisdiction is precisely in point on the factual situation here presented, many courts in cases from other jurisdictions have reached out to bind nonresident plaintiffs.

In *Chance v. Superior Court*, 58 Cal.2d 275, 23 Cal. Rptr. 761, 373 P.2d 849 (1962), the California Supreme Court held a class action to foreclose separate trust deeds securing each of 2,139 notes was proper and did not deny due process to unnamed noteholders, many of whom may not have been California residents, where the class was ascertainable and susceptible to notice, where the virtually identical notes were created in a single transaction as part of a speculative scheme, where all policyholders had common interests in reaching other assets, and where their individual lots were all in one tract which was more valuable as an entity.

In *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 63 Cal. Rptr. 724, 433 P.2d 732 (1967), the plaintiff brought a class action on behalf of himself and all other users of the taxi cab services in the Los Angeles area who were overcharged by Yellow Cab. The California Supreme Court permitted this class action to proceed although some members of the plaintiff class were unknown and may have been residents of other states.

In *Horst v. Guy*, 211 N.W.2d 723 (N.D. 1973), the plaintiff filed a class action to secure payment of a veteran's bonus under the North Dakota Vietnam Conflict Veterans' Adjusted Compensation Act. The appellants claimed a class action was inappropriate because the district court might not have jurisdiction over all class members because some members were outside the state of North Dakota. The North Dakota Supreme Court held:

> ". . . [T]he fact that some of the members of the [plaintiff] class may not be within North Dakota does not remove the jurisdiction of the district court to hear the case as a class action." (p. 727.)

However, there the class was limited to North Dakota residents or former residents who were no longer residents of the state.

Furthermore, the lower federal courts seem to be relatively untroubled by the inclusion of nonresidents in classes represented before them, although federal courts are in the absence of statute, generally limited in territorial reach of personal jurisdiction to the state in which they sit. (Fed. R. Civ. P. 4[f]; 4 Wright and Miller Federal Practice and Procedure, § 1124 [1969]; Compare *School Dist. of Philadelphia v. Harper & Row Publishers, Inc.*, 267 F. Supp. 1001, 1005 [E.D. Pa. 1967].) While the residential characteristics of a class are seldom discussed by fed-

eral courts, it is reasonable to assume from the various factual circumstances giving rise to federal class actions that the court's jurisdiction over the entire class is not affected by the fact some members reside outside the state in which the court sits. (See *e.g., Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452 [E.D. Pa. 1968]; and *City of Philadelphia v. Morton Salt Company*, 248 F. Supp. 506 [E.D. Pa. 1965].)

Many commentators agree a state court has the power to bind a nonresident plaintiff class member. Professor Chafee in *Some Problems of Equity* (1950) notes the Restatement of Judgments "gives the court where a class action is properly brought jurisdiction to bind unnamed members, even if not personally within the jurisdiction of the court." He recognizes the usual rules of *res judicata* apply to all representative suits, but agrees that with some limitations the propositions of the Restatement should usually be applied.

Professor Moore in his treatise, 3B Moore's Federal Practice, § 23.11(5), in discussing the 1938 Federal Rule of Civil Procedure 23 indicates:

> "The fact that members of the class are beyond the territorial limits of the class suit court is immaterial as to the binding effect of the class suit judgment." (p. 23-2893.)

The Restatement of the Law of Judgments verbalizes the answer to the question of nonresident plaintiff class members without equivocation:

> "§ 26. REPRESENTATIVE OR CLASS ACTIONS.
>
> "Where a class action is properly brought by or against members of a class, the court has jurisdiction

> by its judgment to make a determination of issues involved in the action which will be binding as res judicata upon other members of the class, *although such members are not personally subject to the jurisdiction of the court.*" (p. 118.) (Emphasis added.)

Tentative Draft No. 2 of the Restatement of the Law of Judgments, Second, § 85 (April 15, 1975) states:

> "(1) A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of the rules of res judicata as though he were a party. A person is represented by a party who is:
>
> . . .
>
> "(e) The representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member.
>
> "(2) A person represented by a party to an action is bound by the judgment even though the person himself does not have notice of the action, is not served with process, or is not subject to service of process." (pp. 56-57.)

We are persuaded the view expressed by the foregoing authorities represents the correct rule of law to follow. (Contra, Note, Expanding the Impact of State Court Class Action Adjudications to Provide an Effective Forum for Consumers, 18 UCLA L. Rev. 1002, 1019 [1971]; and Fisch, Notice, Costs, and the Effect of Judgment in Missouri's New Common-Question Class Action, 38 Mo. L. Rev. 173, 209 [1973].)

Phillips suggests a contrary conclusion is dictated by *Klemow v. Time Incorporated*, ... Pa. ....., 352 A.2d 12 (1976), cert. denied, 429 U.S. 828, 50 L.Ed.2d 91, 97

S.Ct. 86. There the plaintiff filed a class action suit on behalf of both residents and nonresidents of Pennsylvania who subscribed to *Life* magazine seeking to compel continued publication of the magazine. The trial court dismissed the suit but the Pennsylvania Supreme Court, while reversing on other grounds, indicated the class could not encompass nonresident plaintiffs. The court said in a footnote:

> "Because the jurisdiction of the courts of the Commonwealth is territorially limited, the class may consist only of Pennsylvania residents. The class may also include non-residents who submit themselves to the jurisdiction of the state courts. (Citations omitted.)" (352 A.2d 16.)

However, the Pennsylvania class action statute, 12 P.S.App. Rules of Civ. Proc. § 2230, reads:

> "(a) If persons constituting a class are so numerous as to make it impracticable to join all as parties, any one or more of them who will adequately represent the interest of all may sue or be sued on behalf of all, but *the judgment entered in such action shall not impose personal liability upon anyone not a party thereto.*" (p. 241.) (Emphasis added.)

K.S.A. 60-223(c)(2) provides:

> "The judgment in an action maintained as a class action shall extend by its terms to the members of the class, as defined, whether or not the judgment is favorable to them."

It is readily apparent the Pennsylvania satutory language is completely at variance with the Kansas statutory language. The distinction robs *Klemow* of its persuasion in Kansas. (See Donne and Van Horn, Pennsylvania Class

Actions: the Future in Light of Recent Restrictions of Federal Access?, 78 Dick. L. Rev. 460, 521-524 [1973].)

In *Feldman* v. *Bates Manufacturing Co.*, 143 N.J. Super. 84, 362 A.2d 1177 (1976), the court indicated that without "affiliating circumstances" between the forum state and the litigation, such as a *"common trust fund,"* the judgment in a plaintiff class action suit could not bind nonresident class members. It held class action certification was not appropriate since the judgment would not satisfy due process with respect to the nonresidents. There the Bates Manufacturing Corporation had no assets in New Jersey, was not authorized to do business in New Jersey, and the vast majority of its preferred stockholders (plaintiff class members) were nonresidents with no contacts in New Jersey, which had no special interest in adjudicating litigation. However, the court noted Delaware, Bates' domiciliary state, was fully capable of providing a uniform determination of the issues involved. The *Feldman* court also applied the doctrine of *forum non conveniens* which is inapplicable here because the trial court found "this court having jurisdiction of a large physical portion of the Hugoton-Anadarko area is a convenient forum for such action."

Our rejection of the *Klemow* and *Feldman* cases as applied to the facts here presented is aided by the United States Supreme Court approval of *quasi in rem* class actions which included nonresident class members, some of whom were later found to be bound by the class action decisions. These actions involved as the *res*, insurance funds, and their holdings were found to be determinative of issues concerning the same funds in subsequent actions. In these actions, known as the "common fund" cases, the respective courts found that the various plaintiffs were members of the classes, and therefore bound by the judgments of

the prior actions, despite the fact that the prior actions were conducted in states other than those of the plaintiffs' residences.

Thus in *Hartford Life Ins. Co. v. Ibs,* 237 U.S. 662, 59 L.Ed. 1165, 35 S.Ct. 692, Ibs, a Minnesota resident who was insured by Hartford was held bound by a prior Connecticut state court judgment rendered against Dresser, a Connecticut resident, and 30 other members of Hartford holding certificates who brought suit "in their own behalf and in behalf of all others similarly situated." Dresser's unsuccessful challenge to Hartford's right to increase the premium assessments against Hartford's 12,000 members was held binding on all policyholders, regardless of residence. The United States Supreme Court stated:

> " 'Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained.' . . ." (p. 672.)

(See also *Hartford Life Ins. Co. v. Barber,* 245 U.S. 146, 62 L.Ed. 208, 38 S.Ct. 54 [Connecticut judgment binding on Missouri resident].)

In *Carpenter v. Pacific Mutual Life Insurance Co.,* 10 Cal.2d 307, 74 P.2d 761 (1937), aff'd sub nom. *Neblett v. Carpenter,* 305 U.S. 297, 83 L.Ed. 182, 59 S.Ct. 170, reh. denied, 305 U.S. 675, 83 L.Ed. 437, 59 S.Ct. 355, the California Supreme Court, and ultimately the United States Supreme Court, expanded on the binding effect of judgments in insurance cases on nonresident plaintiffs. The courts upheld the right of the California Insurance Commissioner to liquidate and rehabilitate the Pacific Mutual Life Insurance Company, which was insolvent and on the brink of bankruptcy, against the wishes of the plaintiff class of policyholders. Acknowledging the significant state interest in insurance, and relying on *Hartford Life Insurance Co. v. Ibs,* supra, the California state court judgment was held binding on North Carolina, Illinois and Wisconsin residents. (*Taylor v. Insurance Co.,* 214 N.C. 770, 200 S.E. 882 [1939]; *Larson v. Pacific Mutual Life Ins. Co.,* 373 Ill. 614, 27 N.E.2d 458 [1940], cert. denied, 311 U.S. 698, 85 L.Ed. 452, 61 S.Ct. 137; and *Padway v. Pacific Mut. Life Ins. Co. of California,* 42 F. Supp. 569 [E.D. Wis. 1942].)

Taken together, these cases and subsequent actions in the context of giving full faith and credit to the prior decisions of other state courts clearly recognize a class action may be binding on nonresident plaintiffs when a "common fund" is involved and where due process requirements are met. (See also *Royal Arcanum v. Green,* 237 U.S. 531, 59 L.Ed. 1089, 35 S.Ct. 724; *Supreme Tribe of Ben-Hur v. Cauble,* 255 U.S. 356, 65 L.Ed. 673, 41 S.Ct. 338; *Sovereign Camp v. Bolin,* 305 U.S. 66, 83 L.Ed. 45, 59 S.Ct. 35, 119 A.L.R. 478; and *Sam Fox Publishing Co. v. U.S.,* 366 U.S. 683, 6 L.Ed.2d 604, 81 S.Ct. 1309.)

The "common fund" cases, which seem to be universally accepted, are closely analogous to the case at bar.

Here Phillips filed a corporate undertaking guaranteeing to refund any or all portions of the "FPC suspense money" with interest which it collected and held pending FPC determination of the lawful gas rates in the Hugoton-Anadarko area rate proceedings. All gas royalty owners had a common concern in the funds attributable to "suspense royalties" held by Phillips. The "suspense royalties" in question never did or could belong to Phillips. If the proposed rates had been disapproved, the money *and interest,* which Phillips *agreed* to pay by its corporate undertaking, would have gone to the pipeline companies who purchased the gas from Phillips. If the proposed rates were approved, the "suspense royalties" would go to the gas royalty owners.

Had Phillips put the "suspense royalties" into a common trust fund, separate from its operating funds, to be used solely to pay either the pipeline companies or the gas royalty owners once the FPC ultimately decided the rate increase question, this case would dovetail nicely into the "common fund" cases. Instead Phillips commingled the "suspense royalties" with its other cash and used the "suspense royalties" to fulfill all its business obligations. In this manner the "suspense royalties," which never did or could belong to Phillips, enriched Phillips at the expense of the royalty owners. To hold that Phillips' act of using the money for business purposes, and not putting it into a separate corporate account, takes this case out of the "common fund" category would reward Phillips' action at the expense of innocent gas royalty owners.

In *Perlman v. First National Bank of Chicago,* 15 Ill. App.3d 784, 305 N.E.2d 236 (1973), a class action was brought by bank borrowers who attacked the bank's computation of interest. The defendant bank attacked the class action because there was no common fund. The

bank asserted any money which the class members might claim was commingled with other assets. The Illinois court held:

> ". . . There seems no basis in law or logic for permitting a class action against an individual who has sequestered all money wrongfully acquired but denying one against an individual who has commingled it with his other assets.
>
> ". . . The liability or wrongdoing creates the fund, and whatever is taken wrongfully constitutes the fund." (pp. 800-801.)

(See also Note, Class Actions in Illinois: A Viable Alternative to Federal Rule 23?, 8 J. Marshall J. Prac. and Proc. 113 [1974].)

Phillips kept accurate records on this matter in the memory bank of its computer and our holding will not unduly burden them.

While the authorities are conflicting on whether a class action may bind nonresident defendants, where a "common fund" may fairly be established, no question should be raised as to the binding effect of a class on nonresident plaintiffs.

Class actions with nonresident plaintiffs may be brought in Kansas only if due process guarantees are met. We now examine our class action statute and the procedures followed to insure that due process was provided.

Initially the query must be whether reasonable notice was given to all class members. The notice provisions of K.S.A. 60-223(c) differ slightly from the federal notice provisions in Federal Procedure Rule No. 23. K.S.A. 60-223(c)(2) reads in part:

". . . To afford members of the class an opportunity to request exclusion, the court shall direct that reasonable notice be given to the class, including specific notice to each member known to be engaged in a separate suit on the same subject matter with the party opposed to the class."

K.S.A. 60-223(*d*)(2) reads in part:

"In the conduct of actions to which this section applies, the court may, without limitation, make appropriate orders:. . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action. . . ."

Federal courts have attached particular significance to Rule No. 23's requirement of notice in common question actions due to the finality afforded them. Notice to those whose legal relations are to be affected by a pending action has always been a fundamental requirement of due process. As the United States Supreme Court suggested in *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652, this elementary notion applies even when the interested parties are so numerous that the task of notification is a complex one. In fact, it is *Mullane's* constitutional standard for notice that is incorporated into Rule No. 23: "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable

effort," although some suggest Rule No. 23's requirement of notice does not involve constitutional due process. (See *Eisen v. Carlisle & Jacquelin*, supra.) We need not enter into a discussion on this matter because of the notice given in this case.

Here the notice given fully comports with Federal Rule No. 23, K.S.A. 60-223 and any possible constitutional requirements. Phillips has maintained extensive records in connection with the "suspense royalties." *All gas royalty owners and their interests are known.* There are no unnamed or unknown plaintiff class members. The representative plaintiff prepared the notices, quoted earlier, which were distributed *by Phillips during a monthly payment mailing to all royalty owners in the Hugoton-Anadarko area then receiving gas royalties.* Notices were also sent by first class mail by the plaintiff to former gas royalty owners. Notices were also published in seven area newspapers.

Having Phillips mail the notice during its monthly mailing does not present error here cognizable. This procedure may not comply with the dictates of *Eisen v. Carlisle & Jacquelin*, supra, although that case does note an exception where a fiduciary duty preexisted between the plaintiff and the defendant, as in a shareholder derivative suit.

The record discloses no objection by Phillips at the trial because it was required to mail the notice. It is well settled an issue presented for the first time on appeal will not be considered by this court. (*In re Estate of Barnes*, 218 Kan. 275, 542 P.2d 1004; and *Landrum v. Taylor*, 217 Kan. 113, 535 P.2d 406.) In view of our favorable decision to the class, which may recover the cost of notification, this renders moot Phillips' appellate objection to mailing notice. (See *Lamb v. United Security Life*

Company, 59 F.R.D. 25 [S.D. Iowa 1972]; and *Ostapowicz v. Johnson Bronze Company*, 54 F.R.D. 465 [W.D. Pa. 1972].)

Phillips argues our notice statute which allows a party to "opt-out" of a class action suit cannot be used to "bootstrap" jurisdiction of the court. Suffice it to say the federal rules and our rule regarding class actions are the result of a conscious choice to decide between provisions allowing parties to "opt-out" or "opt-in." A determination was made to follow the "opt-out" procedure to bind the greatest number of people. (See Proposed Rules of Civil Procedure, 39 F.R.D. 69, 105 [1966]; Cohn, The New Federal Rules of Civil Procedure, 54 Geo. L.J. 1204, 1226 [1966]; and Staff Studies Prepared for the National Institute for Consumer Justice on Consumer Class Action, pp. 138, 149 [1972].)

Phillips argues our class action statute does not give the putative class member an absolute right to "opt-out" as does Federal Rule No. 23(c)(2)(A). K.S.A. 60-223(*c*)(2) provides in pertinent part:

> ". . . [T]he court shall exclude those members who, *by a date to be specified*, request exclusion, unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor. . . ." (Emphasis added.)

Phillips argues by removing the choice of the putative class member to "opt-out" of the class, it was the intent of the rule to apply to persons over whom the court already had jurisdiction. We do not think such a convoluted conclusion logically follows. The language simply gives the court the power to deny exclusion to class members, be they residents or nonresidents of Kansas, whose inclusion is essential to the fair and efficient adjudication

of the controversy. However, we need not examine this section in great detail. (See Staff Studies Prepared for the National Institute for Consumer Justice on Consumer Class Action, *supra* at 145-146.)

Here three Texas residents filed an *untimely* request for exclusion. *Phillips* filed a motion to deny the request for exclusion alleging in part the three men would file a class action suit in Texas. The trial court sustained Phillips' motion. However, an *untimely* request for exclusion could be denied under either the federal or Kansas class action statutes without raising constitutional issues.

We hold reasonable notice was given to satisfy jurisdictional and constitutional due process requirements. (*Mullane v. Central Hanover Tr. Co.*, supra.)

Second, we must examine the representation accorded the resident and nonresident plaintiffs by the named representative.

K.S.A. 60-223(*d*) gives the trial court the authority to make appropriate orders as follows:

> ". . . (1) Settling the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be

amended to eliminate therefrom allegations as to representation of absent persons, or to include such allegations, and that the action in either case proceed accordingly. The orders may be combined with an order under K.S.A. 60-216, and may be altered or amended as may be desirable from time to time."

Furthermore, K.S.A. 60-223(*e*) insures adequate representation by controlling dismissals or compromises.

Where inadequate representation is established, courts have denied *res judicata* effect to class action judgments. (See *Research Corp. v. Pfister Associated Growers, Inc.*, 301 F. Supp. 497 [N.D. Ill. 1969]; and *Gonzales v. Cassidy*, 474 F.2d 67 [5th Cir. 1973].)

The class action is premised on the theory that members of the class who are not before the court can justly be bound because the self-interest of their representative coincides with the interest of the members of the class and will assure adequate litigation of the common issues. Where the interests of absent class members have not been adequately represented, binding them by the class judgment would seem to offend the requirements of due process. (*Hansberry v. Lee*, supra.) Notice to absent members of the class in this regard is particularly important, for it is the greatest single safeguard against inadequate representation. (*Mullane v. Central Hanover Tr. Co.*, supra at 314.)

Here we find adequate representation has been accorded the plaintiff class members by their representative through his attorneys who have done a superior job in bringing this action and in arguing and briefing the law on this appeal.

We hasten to add, this opinion should not be read as an invitation to file nationwide class action suits in Kansas and overburden our court system. Concepts of manageability in terms of our Kansas class action statute, the nature of the controversy and the relief sought, the interest of Kansas in having the matter determined, and the class size and complexity will have to be applied. (See Note, Consumer Class Actions with a Multistate Class: A Problem of Jurisdiction, *supra* at 1438-1439.) A court should also give careful consideration, as we have attempted to do, to any possible conflict of law problems. When liability is to be determined according to varying and inconsistent state laws, the common question of law or fact prerequisite of K.S.A. 60-223(*a*)(2) will not be fulfilled.

An excellent example of *a factual situation* in which a trial judge applying our class action statute should deny certification of a class action, where nonresident plaintiff class members are involved, is presented in *Feldman v. Bates Manufacturing Co.*, supra.

The manageability of the class action herein is demonstrated in various ways. There are no basic issues of fact, the material facts having been stipulated by the parties and made a part of the pretrial order. The names, addresses and suspense royalty amounts for each of the royalty owners were readily available in Phillips' records. In fact, the class is more manageable with nonresidents of Kansas included because Phillips would be required to take an extra step in separating nonresident royalty owners in its records. *Phillips treated all royalty owners in the Hugoton-Anadarko area alike, regardless of residency, particular lease provisions or royalty agreements.* (See Phillips' notices to royalty owners heretofore quoted as stipulated by the parties herein.) Actually, it would

be difficult to imagine a more manageable plaintiff class action.

Kansas has a legitimate interest in adjudicating the common issue herein because Kansas comprises the largest physical area included in the FPC designated Hugoton-Anadarko area where Phillips is doing business and producing gas which it sells in interstate commerce. All of the gas royalty owners in the Hugoton-Anadarko area have leases with Phillips and a common interest in the money collected by Phillips as "suspense royalties" from the sale of gas in the designated area. It was the same FPC regulation that caused and permitted Phillips to collect the "suspense royalties," and the same FPC Opinion No. 586 pursuant to which the "suspense royalties" were paid out to the royalty owners in the area. All of the gas royalty owners in the Hugoton-Anadarko area have a right in common with each other, in the equivalent of a common fund, to claim damages for commingling and use of the "suspense royalties" by Phillips, payable as interest, and they have a contact with Kansas by reason of such common interest.

Phillips contends the members of the class within the court's jurisdiction are not so numerous as to make their joinder impracticable. Phillips argues only 218 class members are Kansas residents and of this number only 128 signed a gas royalty agreement of the same type under which Althea Shutts was paid her money in December of 1972. Phillips does not indicate, nor does the record disclose, how many gas royalty leases covering Kansas land are involved. In view of what has heretofore been said, there is no need to examine this contention. (However, see *Williams v. Humble Oil & Refining Company*, 234 F. Supp. 985 [E.D. La. 1964] [joinder of 76 persons impracticable]; *Fox v. Prudent Resources Trust*, 69 F.R.D.

74 [E.D. Pa. 1975] [joinder 148 limited partners impracticable]; *Sabala v. Western Gillett, Inc.*, 362 F. Supp. 1142 [S.D. Tex. 1973] [class began with 39 and twelve opted-out]; and *Republic Nat. Bank of Dallas v. Denton & Anderson Co.*, 68 F.R.D. 208 [N.D. Tex. 1975].)

Phillips argues this is not a proper class action case under K.S.A. 60-223(*b*)(1). We think this point is immaterial. The trial court treated it as a K.S.A. 60-223(*b*)(3) class action, despite its class order finding number four which was relevant to a 60-223(*b*)(1) class action.

The appellant contends the trial court erred in holding that Phillips had been unjustly enriched by retaining certain increased proceeds of gas sales, subject to refund under appropriate FPC regulations, until final determination by the FPC of the just and lawful rate for such gas sales.

The trial court awarded interest on the grounds of unjust enrichment as reflected in its tenth conclusion of law, heretofore quoted. The doctrine of unjust enrichment prevents one from profiting or enriching himself at the expense of another contrary to equity. But there must be some specific legal principle or situation which equity has established or recognized to bring a case within the scope of the doctrine. (*Anderson v. Anderson*, 155 Kan. 69, 72, 123 P.2d 315.)

The appellant contends, and we agree, its retention of the suspense royalties pending FPC determination was lawful. (*Ashland Oil & Refining Company v. Staats, Inc.*, 271 F. Supp. 571 [D. Kan. 1967]; *Boutte v. Chevron Oil Company*, 316 F. Supp. 524 [E.D. La. 1970], aff'd 442 F.2d 1337 [5th Cir. 1971], and *Phillips Petroleum Company v. Adams*, 513 F.2d 355, 361-362 [5th Cir. 1975], cert. denied 423 U.S. 930, 46 L.Ed.2d 259, 96 S.Ct. 281.) How-

ever, that does not mean Phillips owes no interest as a result of the long retention of the FPC "suspense royalties." (*Boutte v. Chevron Oil Company*, supra.)

This identical issue was presented in *Lightcap v. Mobil Oil Corporation*, 221 Kan. 448, 562 P.2d 1. (On June 15, 1977, Mr. Justice White of the United States Supreme Court stayed the mandate of this court in that case.) In *Lightcap*, Mobil was paying gas royalties on the basis of old contract rates of 8.74 cents and 7.15 cents per Mcf while collecting increased rates. Mobil and its predecessors made active use of the plaintiffs' monies collected and plaintiffs were deprived of that use. Although this court was not in complete agreement on other aspects of that opinion, it unanimously held:

> "Where a party retains and makes actual use of money belonging to another, equitable principles require that it pay interest on the money so retained and used." (Syl. 12.)

As previously indicated the FPC may order Phillips or any other natural gas companies to refund, with interest, the portion of such increased rates or charges found not justified by the FPC. (15 U.S.C. § 717c[e]; and 18 C.F.R. § 154.102[c].) The rate of interest in the event a refund is ordered is presently seven percent (7%) per annum for all rate filings tendered prior to October 10, 1974. (18 C.F.R. § 154.102[c].)

In the case at bar, beginning on June 1, 1961, Phillips withheld the share of the class members of the increased gas prices subject to refund. Thereafter, while the FPC slowly ground out FPC Opinion No. 586, Phillips deposited the increased rate monies in its general accounts and commingled them with other funds without giving further notice to the royalty owners. *What is significant*

is these gas royalty suspense monies never did or could belong to Phillips. If the FPC disapproved the proposed increase rates the pipeline companies (gas purchasers of Phillips) would receive this suspense money *and the interest which Phillips had agreed to pay by its corporate undertaking.* If the FPC approved the proposed increase rate, the "suspense royalties" would go to the gas royalty owners.

Phillips held a sizable amount of money during this period. On or about December 7, 1972, Phillips mailed approximately $5,700,000 in additional gas royalties due gas royalty owners by virtue of the finality of FPC Opinion No. 586. A case comment on this subject at 54 Tex. L. Rev. 847 (1976) noted:

> ". . . Phillips had collected $7,500,000 in additional proceeds from the Permian Basin area under FPC Op. No. 662 and currently collects $500,000 per month subject to refund under FPC Op. No. 669, which relates to nationwide rates. Petitioner's Brief for Certiorari at 9, Phillips Petroleum Co. v. Adams, 96 S.Ct. 281 (1975). Five major oil companies paid approximately $4.5 million in suspense money royalties alone (normally one-eighth of the amount paid to lessees) to 16,000 Kansas and Oklahoma owners under the same FPC rate case in *Adams*. Sunday Oklahoman, Jan. 11, 1976, § B. at 2, col. 1. A Kansas state court recently awarded approximately $1.5 million in interest payments to royalty owners. Nix v. Northern Natural Gas Producing Co., No. 3116 (Dist. Ct. Grant County, Kan., Jan. 8, 1976). The potential problems grow daily as the FPC encourages the filing of rate increases to provide an incentive to increase the supply of natural gas. . . ." (fn. 54, pp. 856-857.)

Furthermore, Phillips did not permit the suspense royalty money collected to remain idle. O. W. Armstrong, Treasurer of Phillips Petroleum Company, testified in part as follows:

> ". . . Phillips' short term investments ranged from 89.7 million dollars in 1964 up to 338.5 million dollars in 1972. . . Phillips' total assets went up from $1,806,000,000.00 in 1963, to $3,269,000,000.00 in 1972, with the exception of 1970 when there was a slight drop. . . Cash in excess of a given amount would be surplus cash and is invested. . . the approximately $6,000,000.00 in F.P.C. suspense money was a part of Phillips' cash, . . . all of Phillips' cash being in one pot, . . . not segregated for any purpose. . . ."

Phillips made substantial profit during the years 1961-1973. The net profit ranged from $113,000,000 to $132,000,000 during the period in question and stockholders' equity increased from $1,205,000,000 in 1962 to over $1,749,000,000 in 1971.

Phillips' use of the "suspense royalties" was clearly a sound and profitable business practice. We cannot condemn Phillips for using this money because this was apparently not repugnant to the FPC regulatory scheme, or repugnant to Phillips' contractual relations with the gas purchasers under federal case law. Nor do we condemn Phillips for the FPC delay. However, we do not believe that Phillips may enrich itself in the absence of any contractual sanction or seize upon the procedural complexities of the FPC to avoid responsibility for an appropriate measure of damages, expressed in terms of interest. In *Shapiro v. Kansas Public Employees Retirement System*, 216 Kan. 353, 357, 532 P.2d 1081, the court enunciated the following general principle:

> "Interest has been defined as the compensation allowed by law or fixed by the parties for the use, detention, or forbearance of money. In our society today money is a commodity with a legitimate price on the market and loss of its use, whether occasioned by the delay or default of an ordinary corporation, citizen, state or municipality should be compensable."

(See also *Lightcap v. Mobil Oil Corporation*, supra at 468-469.)

In passing we also note a long line of federal cases have concluded Texas law permits—and equity requires—the award of interest on suspense royalties under similar circumstances. (*Phillips Petroleum Company v. Adams*, 513 F.2d 355, 365 [5th Cir. 1975], cert. denied, 423 U.S. 930, 46 L.Ed.2d 259, 96 S.Ct. 281; *First Nat. Bank of Borger v. Phillips Petroleum Co.*, 513 F.2d 371 [5th Cir. 1975], cert. denied, 423 U.S. 930, 46 L.Ed.2d 259, 96 S.Ct. 281; *Phillips Petroleum Co. v. Riverview Gas Compression Company*, 513 F.2d 374 [5th Cir. 1975], cert. denied, 423 U.S. 930, 46 L.Ed.2d 259, 96 S.Ct. 281; *Phillips Petroleum Co. v. Hazlewood*, 534 F.2d 61 [5th Cir. 1976]; *Fuller v. Phillips Petroleum Co.*, 408 F. Supp. 643 [N.D. Tex. 1976]; and *Phillips Petroleum Co. v. Hazlewood*, 409 F. Supp. 1193 [N.D. Tex. 1975].)

In addition, the Texas Civil Court of Appeals recently awarded interest on suspended royalties in *Stahl Petroleum Co. v. Phillips Petroleum Co.*, 550 S.W.2d 360 (Tex. Civ. App. No. 8762, filed April 6, 1977.) This case also arises out of the Hugoton-Anadarko area and the issuance of FPC Opinion No. 586. While recognizing *Phillips Petroleum Company v. Adams*, supra, the Texas Civil Court of Appeals relied on the terms of the *royalty agreement* and the Texas interest statute, rather than unjust enrich-

ment, to require the payment of prejudgment interest on the suspended royalties.

An examination of the royalty agreement set forth in the record herein reveals the lessee (Phillips) contracted to pay and the lessor (royalty owner) contracted to receive a percentage of the "weighted average price per Mcf received by lessee from all sales of gas delivered within" a designated area during any calendar month. While the term "received" is not defined in the contract, giving the term its ordinary meaning, Phillips expressly contracted to pay a percentage of the *price received* for the sale of gas on which month-by-month payments to the royalty owner were to be based. Although the money received by Phillips for the sale of gas in excess of the established rates pending FPC determination was subject to possible refund, *none of the excess was contractually excluded from the price received by Phillips and on which payment to the royalty owner was contractually based.* There was no rule or regulation which prohibited Phillips from including the excess in the amount on which calculation of payment to the royalty owner on a month-to-month basis was made. (*Stahl Petroleum Co. v. Phillips Petroleum Co.*, supra.) But if Phillips chose to withhold payments of contractually owing "suspense royalties" pending FPC approval, as authorized by prior federal case law, that did not relieve Phillips of its contractual obligation to pay the *price received* with interest for the period of time the suspense money was held and used by Phillips.

Oklahoma has no decision allowing interest on "suspense royalties." However, several Oklahoma decisions hold that interest may be awarded on equitable grounds where necessary to arrive at a fair compensation. (*Smith v. Owens*, 397 P.2d 673 [Okla. 1963]; and *First Nat. Bank & T. Co. v. Exchange Nat. Bank and T. Co.*, 517 P.2d 805 [Okla. App. 1973].)

Furthermore, the United States Supreme Court has noted the imposition of interest on refunds ordered by the FPC is not an inappropriate means of preventing unjust enrichment. (*United Gas v. Callery Properties*, 382 U.S. 223, 15 L.Ed.2d 284, 86 S.Ct. 360.)

Based on the foregoing authorities we hold in this case that interest on suspended royalties may be recovered for the period of time such royalties remained in the control of, and were available for use by, the gas producer (Phillips) during the pendency of FPC proceedings and related litigation regarding the determination of applicable lawful rates for gas sales, and litigation regarding the determination of issues involved in this appeal.

Having determined that interest can be awarded, the question becomes what rate of interest should be applied. The district court found:

> "The statutory rate of interest herein in Kansas, Oklahoma and Texas is six per cent per annum and is allowed as the proper rate of interest to be applied to the suspended royalties herein from time of receipt until date of judgment herein with interest compounded on an annual basis."

Phillips contends the trial court erred in holding that under the facts in this case it was proper to award compound interest. It argues a (legal) (statutory) rate of six percent (6%) simple interest must apply under the laws of Kansas, Texas and Oklahoma.

The appellee has cross-appealed contending the trial court erred in failing to consider inflation rates and profits so as to place the owners at least on a par with gas purchasers.

In *Lightcap v. Mobil Oil Corporation*, supra, this court resolved the matter. There the court noted:

> "Here Mobil and its predecessor made active use of plaintiffs' money, and plaintiffs were deprived of that use. Under the reasoning of the foregoing cases plaintiffs are entitled to be compensated for their loss. Mobil was obligated by FPC order to pay Northern 6% interest on Northern's share of the 'impounded' money; *equitable principles require that the royalty owners receive the same treatment as to their share.* . . ." (p. 469.) (Emphasis added.)

In the instant case Phillips was obligated by FPC order to pay gas purchasers seven percent (7%) until September 18, 1970, and thereafter eight percent (8%) interest on the gas purchasers' share of the suspense monies. Here equitable principles require, and contractual principles dictate, that the royalty owners receive the same treatment as to their share.

Phillips cites the interest laws of Kansas, Texa and Oklahoma. K.S.A. 16-201 provides:

> "Creditors shall be allowed to receive interest at the rate of six percent per annum, *when no other rate of interest is agreed upon*, for any money after it becomes due, for money lent or money due on settlement of account, from the day of liquidating the same and ascertaining the balance, for money received for the use of another, and retained without the owner's knowledge of the receipt, for money due and withheld by an unreasonable and vexatious delay of payment or settlement of accounts, for all other money due and to become due for the forbearance of payment whereof an express promise to pay interest has been made, and for money due from corporations

> and individuals to their day or monthly employees, from and after the end of each month, unless the same shall be paid within fifteen days thereafter." (Emphasis added.)

Texas Rev. Civ. Stat., Art. 5069-1.03 (1971) states:

> "*When no specified rate of interest is agreed upon by the parties*, interest at the rate of 6% per annum shall be allowed on all written contracts ascertaining the sum payable, from and after the time when the sum is due and payable; and on all open accounts, from the first day of January after the same are made." (Emphasis added.)

Oklahoma Stat., tit. 15, § 266 (1966) states:

> "The legal rate of interest shall not exceed six per cent *in the absence of any contract* as to the rate of interest, and by contract, *parties may agree upon any rate* not to exceed ten per cent per annum. Said rates of six and ten per cent shall be respectively, the legal rate and the maximum contract rates of interest." (Emphasis added.)

All these statutes refer to situations where there is no agreement as to the rate of interest. Here that situation does not exist.

We are dealing with "suspense royalties" which never could or would belong to Phillips. This was the equivalent of a common fund which was accumulated and used by Phillips. After the FPC Opinion No. 586 was announced the monies accumulated by Phillips in this fund were later divided between the gas purchasers and the gas royalty owners. In other words, Phillips was a stakeholder who retained the fund which it used for its own benefit. (See *Phillips Petroleum Company v. Adams*, supra.) What

justified the payment of seven percent (7%), and later eight percent (8%), interest on part of this common fund which Phillips *expressly contracted and agreed to pay* to the gas purchasers, while paying only six percent (6%) interest to the gas royalty owners, is impossible to discern. If the FPC had denied all of Phillips' rate increase applications, Phillips would have had to pay seven percent (7%), and later eight percent (8%), interest to the gas purchasers *pursuant to its express agreement and corporate undertaking with the FPC. Thus, Phillips has made an express agreement,* with regard to the monies accumulated in the suspense fund by Phillips, *to pay seven percent (7%), and later eight percent (8%) interest,* as ultimately determined by the FPC Opinion No. 586.

Due to limitations on the FPC jurisdiction, it could not provide in its order that interest be paid to the gas royalty owners. (*Mobil Oil Corporation v. Federal Power Commission*, 463 F.2d 256 [D.C. Cir. 1972], cert. denied, 406 U.S. 976, 32 L.Ed.2d 676, 92 S.Ct. 2413; and *Lightcap v. Mobil Oil Corporation*, supra at 470, 471.) However, the FPC did require Phillips to agree to pay interest on the suspense monies they held, which agreement the members of the plaintiff class herein assert as an appropriate measure of damages, expressed in terms of interest, for the commingling and use of the suspense monies by Phillips.

This answers Phillips' contention that *Columbian Fuel Corp. v. Panhandle Eastern Pipe Line Co.*, 176 Kan. 433, 271 P.2d 773 and other cases prevent the payment of interest on unliquidated sums. In *Columbian Fuel* an interim rate increase was approved by the Kansas Corporation Commission on natural gas sold to the buyer. The buyer was permitted to withhold the increase upon securing a bond. The seller brought suit seeking to collect interest

on the amount withheld. This court noted the temporary nature of the Kansas Corporation Commission order and disallowed interest. The court held:

> "In the absence of an agreement therefor interest may not be recovered on a claim as long as the validity of the claim is unadjudicated and the amount on which interest could be computed, if the claim be declared valid, remains wholly uncertain and unliquidated." (Syl. 5.)

Here, of course, an agreement for the payment of interest on the part of Phillips is clearly present. Further, the suspended payments in *Columbian Fuel* did not necessarily belong to another. Here the "suspense royalties" belong either to the royalty owners or the pipeline companies. Thus we reaffirm our decision in *Lightcap*, supra at 466, distinguishing *Columbian Fuel*.

Having determined that seven percent (7%), and later eight percent (8%), interest can be awarded, we must determine whether the actions of the royalty owners have waived their right to interest. The appellant contends the trial court erred in holding that the plaintiff class, by refusing to accept the increased proceeds from gas sales from Phillips under an obligation to refund the same, if Phillips was ultimately obligated to do so, did not waive any claim to interest on such proceeds, or were not estopped from making such claim.

Phillips relies on its July 1961, notice sent to Althea Shutts and all other royalty owners in the Hugoton-Anadarko area which provided in pertinent part:

> "Interest owners desiring to receive payments computed currently on the full sums being collected may arrange to do so by furnishing Phillips Petroleum

Company acceptable indemnity to cover their proportionate part of any required refunds, plus the required interest."

The seventeen royalty owners who accepted Phillips' offer to reimburse Phillips with interest for any "suspense royalties" which the FPC might require Phillips to refund to the gas purchasers are not members of the plaintiff class. Phillips contends it would be inequitable under these circumstances to require it to now pay interest to these royalty owners who refused to accept the money under the same risk Phillips undertook.

Where, as here, Phillips has expressly contracted to pay a percentage of the *price received* for the sale of gas on which month-by-month payments to royalty owners were to be based, and the amount received by Phillips for the sale of gas in excess of the established rates pending FPC determination, although subject to possible refund, was not contractually excluded from the *price received*, Phillips is in no position to unilaterally impose burdensome conditions upon the royalty owners precedent to fulfilling its contractual commitment albeit permissive until final FPC approval of rate increase applications. Furthermore, the notices sent by Phillips to its gas royalty owners indicated Phillips was not unduly concerned with security for the possible return of "suspense royalties" paid out. The notice sent royalty owners by Phillips on or about November 25, 1970, *informed* royalty owners it was giving effect to full ceiling rate levels established by FPC Opinion No. 586 in the payment of royalty, although the opinion had not become final. In the notice Phillips further informed royalty owners it would expect reimbursement in full for any overpayments resulting in the reduction of levels relied upon should there be a change in the FPC Opinion No. 586, and that Phillips would withhold

from subsequent payments of royalty on gas or oil, or both, at its election, any overpayment occasioned thereby. The royalty owner was told acceptance of the check would constitute consent to such recovery of overpayments.

It is apparent Phillips' previous imposition of burdensome conditions upon royalty owners for payment of royalty at ceiling rate levels pending FPC approval of gas rate increases, was designed to accomplish precisely what the facts disclose. Virtually none of the royalty owners complied with the conditions, thereby leaving the "suspense royalties" in the hands of Phillips as stakeholder to use at its pleasure in the operation of its business over the long period of time the FPC retained jurisdiction over Phillips' rate increase applications.

Under the circumstances we have no hesitance in holding that the royalty owners in the plaintiff class did not waive any claim to interest on "suspense royalties" held by Phillips, by declining to honor the burdensome conditions unilaterally imposed by Phillips for their monthly payment. For the same reasons the royalty owners are not estopped to assert their claim in this action. Phillips' assertion of equity, by arguing it would be inequitable to require Phillips to now pay interest to these persons who refused to accept the money under the same risk that Phillips held it, is not impressive. It distorts the facts and ignores Phillips' admissions. The conditions imposed by Phillips were far more stringent than the corporate undertaking Phillips filed with the FPC.

Phillips argues when the plaintiff class members accepted the December 7, 1972, payment of suspense royalties and negotiated Phillips' checks, this extinguished the debt and any right that might have existed to sue for interest thereon, and that the trial court erred in holding to the contrary. Phillips alleges they do not rely on accord and

satisfaction or an estoppel, but rather on the rule that payment of the principal sum is a legal bar to a subsequent action for interest.

The notice Phillips unilaterally mailed to all of its royalty owners on or about December 7, 1972, enclosing checks, to cover payment based upon gas proceeds previously held in suspense, said nothing about interest or how long the money had been held or used by Phillips. However, as previously indicated, Phillips is liable for interest on these suspense royalty funds which it retained as a stakeholder and used in the operation of its business. The payment of these funds to the plaintiff class members, instead of extinguishing the debt, constituted only a partial payment on an interest-bearing debt. This situation invokes application of the so-called "United States Rule," which provides that in applying partial payments to an interest-bearing debt which is due, in the absence of an agreement or statute to the contrary, the payment should be first applied to the interest due. (45 Am. Jur.2d, Interest and Usury, § 99, pp. 88-89; and 47 C.J.S., Interest, § 66, pp. 72-73.)

Kansas approved this rule in *Christie v. Scott,* 77 Kan. 257, 94 Pac. 214, in determining appellate jurisdiction, and cited the rule with approval in *Jones v. Nossaman,* 114 Kan. 886, 221 Pac. 271, 37 A.L.R. 317.

The "United States Rule" is also followed in Oklahoma and Texas. (*Landess v. State,* 335 P.2d 1077 [Okla. 1958]; *Straus v. Brooks,* 126 S.W.2d 542 [Tex. Civ. App. 1939], rev'd on other grounds, 136 Tex. 141, 148 S.W.2d 393 [Civ. App. 1941]; and *J. I. Case Co. v. Laubhan,* 64 S.W.2d 1079 [Tex. Civ. App. 1933].)

Thus, we conclude, acceptance of the so-called "principal sum," by the royalty owners is not a bar to their

claim in this case. Phillips raised and lost a similar argument in *Phillips Petroleum v. Riverview Gas Compression Co.,* 409 F. Supp. 486 (N.D. Tex. 1976), the sequel to *Phillips Petroleum Co. v. Adams,* supra.

In the exercise of equitable powers our court has refused to bar relief under theories of ratification, waiver or estoppel where one due to unequal bargaining power or knowledge accepts a check in reliance on a fraudulently induced impression by the payor. (*Prather v. Colorado Oil & Gas Corp.,* 218 Kan. 111, 542 P.2d 297; and cases cited therein.)

Phillips argues the Oklahoma class members are not entitled to recovery by reason of Okla. Stat. Ann., tit. 23, § 8 (1951), which provides: "Accepting payment of the whole principal, *as such,* waives all claim to *interest.*" In the instant case there is no indication the principal was accepted, *as such.* We further note Oklahoma has not strictly construed this statute. (*Webster Drilling Co. v. Sterling Oil of Oklahoma, Inc.,* 376 P.2d 236 [Okla. 1962].)

An identical statute in California was said to be a rule of construction to be applied between parties dealing at arm's length, where their agreement is to be inferred from the fact that the principal is tendered and accepted, and the statute was held to have no application where the conditions of payment are such that the creditor has no opportunity to assert his claim for interest at the time of payment. (*McConnell v. Pacific Mutual Life Ins. Co.,* 205 Cal. App.2d 469, 24 Cal. Rptr. 5 [1962].) Here the individual class members had no practical opportunity to assert their claim for interest under the circumstances of Phillips' payout.

We therefore hold on equitable principles Phillips is required to pay its royalty owners herein seven percent (7%) per annum simple interest on suspense royalties from the date of receipt of suspense royalties by Phillips until October 1, 1970 (the effective date of FPC Opinion No. 586), and eight percent (8%) simple interest per annum thereafter until the payout to the royalty owners on or about December 7, 1972. Applying the "United States Rule" on partial payments, after the payout there was still an unpaid principal sum due equal to the total principal due plus accrued interest, less the payout. Assuming proper calculations, this amount, although principal, would equal the accrued interest on the date of the payout. From December 7, 1972, on until the date of judgment (July 29, 1976) equitable principles and Phillips' contractual undertaking require Phillips to pay its royalty owners herein eight percent (8%) per annum simple interest on the unpaid principal sum (accrued interest on date of payout) plus the unpaid principal sum; and thereafter our post-judgment interest statute, K.S.A. 16-204, requires payment of eight percent (8%) per annum simple interest for the benefit of the royalty owners on the total amount of the judgment until paid.

Accordingly, the judgment of the lower court is affirmed in part and modified in part, and the case is remanded for further proceedings consistent with the foregoing opinion.

APPENDIX C

TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW IN NIX v. NORTHERN AND MOBIL

FINDINGS OF FACT

(Filed January 8, 1976)

Undisputed facts in this matter are as follows:

1. Plaintiffs Hazel Nix, Fred Schupbach, Jr., et al., filed this action individually and as representatives of that class of oil and gas royalty owners under defendants' Northern Natural Gas Producing Company and Mobil Oil Corporation, oil and gas leases in the Hugoton-Anadarko production area.

2. Defendant Northern Natural Gas Producing Company is a wholly owned subsidiary of defendant Mobil Oil Corporation and both defendants are natural gas companies within the purview of the Natural Gas Act and since the Phillips decision have been subject to rate regulation by the Federal Power Commission (FPC).

3. Commencing in 1967, defendant Mobil and, 1968, defendant Northern, and pursuant to FPC regulations, defendants received rates based on contracts with their purchasers in various amounts which were subject to FPC approval. Under each higher rate negotiated the FPC permitted the defendants to receive the new rate pending final approval by posting a bond and requiring interest to be paid to the purchasers for any amount received in excess of the finally approved rate. The burden on the FPC of a nearly infinite number of applications for rate approval resulted in the Hugoton-Anadarko area rate

opinion No. 586 entered September 18, 1970. The validity of FPC Order No. 586 was challenged in the courts and finally sustained in October 28, 1972.

4. Subsequently, in May, 1971, 5739 royalty owners were paid approximately $223,000.00 by Northern, and approximately $1,250,000.00 by Mobil, as their royalty interest share of the suspended rates. This amount was the royalty interest share (normally 1/8th) without interest. Portions of the suspended rates not approved were refunded to defendant's purchasers with interest at the rate of 7% per annum until October 1, 1970, and at the rate of 8% per annum thereafter as required by FPC regulation 154.102(c) and Order No. 586.

5. The FPC has no jurisdiction over royalty rates as such (*Mobil Oil* v. *Federal Power Commission*, 464 F2d 256) and had no regulations purporting to cover interest in relation to the royalty interest in the suspended payments held by defendants.

6. Plaintiffs were allowed to proceed by previous order of this court as a class action and all members of the class were served with notice by first class mail and by publication.

7. Plaintiffs by this action seek interest on the royalty owners share of the increased rates collected by the defendants and held as "suspended royalties" until approved by FPC Order 586. These monies were collected by defendants and commingled with its other funds for operational purposes.

8. No demand for interest was made on the defendants until the filing of this action and the disbursement of the suspended royalties in 1971 did not include an accounting of the rates involved nor did it contain any indication as to whether or not interest was included.

ISSUES

Plaintiffs contend it is entitled to judgment for interest on the "suspended royalties" from date of receipt herein on the following ground:

1. Statutory interest based on implied contract because of the use of money by defendants belonging to royalty owners and resulting trust or constructive trust.

2. Equitable relief based on Quasi contract or because of unjust enrichment accruing to defendants by use of funds belonging to others than defendants.

Defendants contend:

1. That a class action is improper because the court lacks jurisdiction of all members of the class and also because of varying laws in the states of Kansas, Oklahoma and Texas.

2. The leases herein were subject to the Natural Gas Act and orders of the FPC under provisions that the leases were subject to all Federal and State laws and regulations which limited the bases for computation of royalty rates to those actually paid and finally approved by the FPC which rates were paid by defendants herein.

3. That there was no liquidated amount until final FPC approval and hence no figure on which to compute interest on either a damage or contract theory of recovery.

4. That the statute of limitations as well as laches, estoppel and accord and satisfaction preclude recovery herein.

CONCLUSIONS OF LAW

1. This is a proper class action under the provisions of K.S.A. Supp. 60-223 because:

(a) The 246 royalty owners in the Hugoton-Anadarko area makes joinder impracticable;

(b) Any interest due each member of the class is too small to justify separate actions;

(c) Questions of fact and law are common to all members in that the facts are really undisputed and the sole legal issue presented is whether the plaintiff members are entitled to interest on the suspended royalties held by defendants;

(d) The claims of the named parties herein are typical of the claims of all members of the class and will fairly and adequately protect the interest of the class;

(e) The question presented common to all members of the class predominate over any individual question and a class action is not superior but the only efficient manner to adjudicate the dispute herein (to avoid multiple suits and excessive expenses) and that this court having jurisdiction of a large physical portion of the Hugoton-Anadarko area is a convenient forum for such action.

2. Defendants, in compliance with its contractual duty with its royalty owners, secured the best price obtainable under the FPC regulations. These regulations required defendant to post bond and agree to the interest pay back provisions to its purchasers or to forfeit the negotiated price increases until final FPC approval.

3. The portion of the increased rates secured under the above paragraph that applied to the royalty share of the proceeds was to be paid to royalty owners or to be refunded if not approved by the FPC. This royalty share did not belong to the defendants whether or not the rate was approved by the FPC.

4. These monies were held on account for the royalty owners and no cause of action accrued until the May, 1971, distribution of the "suspended royalties" as to the amount of the royalties (not in issue herein) or the question of interest payable as a result of the withholding. Since the petition herein was filed January 24, 1974, not even the implied contract statute of limitations of three years in Kansas and Oklahoma (and four years in Texas) has run and the court finds the written contract limitation should apply.

5. The defendants concomitant with their duty to their royalty owners to secure the best price obtainable (under its covenant to market) had the duty to remit the collected share of royalty as promptly as commercially feasible on the same conditions as it was received by defendants or in the alternative to place the funds in a proper investment fund for subsequent disbursement. The fact that FPC permitted and essentially required defendants to post bond and agree to pay back interest if a refund was ordered did not entitle defendants to free use of the royalty owners share of the increased proceeds. The FPC bond and interest pay back requirements certainly justify and permit defendants business use of the increased rates of its own share of those rates but not the royalty owners share which did not belong to defendants under any eventual ruling by the FPC. See *Phillips Petroleum Co.* v. *Adams*, 513 F2d 355. The Court therefore concludes that the defendants are liable for interest on royalty proceeds retained by it and used as a business asset by it pending final FPC approval and conclusion of litigation based on its contractual duty to remit royalty proceeds in a reasonably prompt manner. It is specifically not the basis of this decision that such duty arises from a resulting trust theory or to attempt to impose any facet of a fiduciary relationship to the defendants.

6. The evidence proffered by plaintiffs consisting of the profit and loss statements of defendants and reports relating to economic inflation were based on a theory of unjust enrichment and is excluded and not considered herein. Nor is the FPC regulation requiring interest of the royalty share returned to the purchasers controlling herein. The FPC regulation in point herein did not, and could not for lack of jurisdiction to do so, attempt to regulate the obligation between defendants and members of the plaintiff class herein as to the time or manner or amount of the royalty interests to be paid out of the increased rates.

7. The royalty owners were entitled to rely on defendants to collect the best price obtainable and to represent the royalty owners' interest before the courts and the FPC (as a result of the implied lease covenant.) This does not imply, however, consent for the defendants to use the royalty proceeds as a business asset resulting in the economic gain of interest to defendants to the exclusion of the royalty owners.

8. The acceptance without an accounting as to rates or interest of payment of the suspended royalties herein in May, 1971, did not constitute accord and satisfaction because there was no basis for the royalty owners to know what was involved in the payment. For the same reason estoppel does not apply to preclude recovery herein. Laches does not apply for reasons stated herein pertaining to the statute of limitations.

9. The statutory rate of interest herein in Kansas, Oklahoma and Texas is six per cent per annum and is allowed as the proper rate of interest to be applied to the suspended royalties herein from time of receipt until date of judgment herein with interest compounded on an annual basis.

10. The claims of the named Plaintiffs made on behalf of the Plaintiff Class are separate and distinct from the claims asserted in *Harry Lightcap, et al.* v. *Mobil Oil Corporation*, now pending on appeal, Kansas Supreme Court Case No. 47,991, and approximately 280 related cases; *W. J. Light, et al.* v. *Mobil Oil Corporation*, Stevens County District Court Case No. 5156; and *Clarence P. Roehr, et al.* v. *Mobil Oil Corporation*, Stevens County District Court Case No. 5157. And further excluding those individuals who have filed their elections herein to be excluded as members of the Plaintiff Class.

JUDGMENT IS THEREFORE entered for the Plaintiff Class as set forth herein with Defendants ordered to account to the Court as set forth herein for members of Plaintiff Class.

The issue of attorney fees is reserved pending the accounting ordered herein.

DATED January 8, 1976.

APPENDIX D

TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SHUTTS v. PHILLIPS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed August 2, 1976)

FINDINGS OF FACT

The stipulations in the pre-trial order provide adequately for the findings of fact necessary to present the issues herein and are adopted by the court by reference as its findings of fact herein.

Also, the contention of the parties are set forth in the pre-trial order in at least sufficient length and are also adopted by reference.

CONCLUSIONS OF LAW

1. This is a proper class action under the provisions of K.S.A. Supp. 60-223 because:

(a) The approximately 6400 royalty owners in the Hugoton-Anadarko area makes joinder impractable; [sic]

(b) Any interest due ach member of the class is too small to justify separate actions;

(c) Questions of fact and law are common to all members in that the facts are really undisputed and the sole legal issue presented is whether the plaintiff members are entitled to interest on the suspended royalties held by defendant;

(d) The claims of the named parties herein are typical of the claims of all members of the class and will fairly and adequately protect the interest of the class;

(e) The question presented common to all members of the class predominate over any individual question and a class action is not only superior but the only efficient manner to adjudicate the dispute herein (to avoid multiple suits and excessive expenses) and that this court having jurisdiction of a large physical portion of the Hugoton-Anadarko area is a convenient forum for such action.

2. Defendant, in compliance with its contractual duty with its royalty owners, secured the best price obtainable to post bond and agree to the interest pay back provisions to its purchasers or to forfeit the negotiated price increases until final FPC approval.

3. The portion of the increased rates secured under the above paragraph that applied to the royalty share of the proceeds was to be paid to royalty owners or to be refunded if not approved by the FPC. This royalty share did not belong to the defendant whether or not the rate was approved by the FPC.

4. The defendant concomitant with its duty to its royalty owners to secure the best price obtainable (under its covenant to market) had the duty to remit the collected share of royalty as promptly as commercially feasable [sic] on the same conditions as it was received by defendant or in the alternative to place the funds in a proper investment fund for subsequent disbursement. The fact that FPC permitted and essentially required defendant to post bond and agree to pay back interest if a refund was ordered did not entitle defendant to free use of the royalty owners share of the increased proceeds. The FPC bond and interest pay back requirements cer-

tainly justify and permit defendant business use of the increased rates of its own share of those rates but not the royalty owners share which did not belong to defendant under any eventual ruling by the FPC. See *Phillips Petroleum Co. v. Adams*, 513 F2d 355. The Court therefore concludes that the defendant is liable for interest on royalty proceeds retained by it and used as a business asset by it pending final FPC approval and conclusion of litigation based on its contractual duty to remit royalty proceeds in a reasonably prompt manner. It is specifically not the basis of this decision that such duty arises from an attempt to impose any facet of fiduciary relationship to the defendant.

5. The evidence proffered by plaintiff consisting of the profit and loss statements of defendant and reports relating to economic inflation is excluded and not considered herein. Nor is the FPC regulation requiring interest of the royalty share returned to the purchasers controlling herein. The FPC regulation in point herein did not, and could not for lack of jurisdiction to do so, attempt to regulate the obligation between defendant and members of the plaintiff class herein as to the time or manner or amount of the royalty interests to be paid out of the increased rates.

6. The royalty owners were entitled to rely on defendant to collect the best price obtainable and to represent the royalty owners' interest before the courts and the FPC (as a result of the implied lease covenant.) This does not imply, however, consent for the defendant to use the royalty proceeds as a business asset resulting in the economic gain of interest to defendant to the exclusion of the royalty owners.

7. The acceptance without an accounting as to rates or interest of payment of the suspended royalties herein

in December, 1972, did not constitute ratification because there was no basis for the royalty owners to know what was involved in the payment. For the same reason estoppel does not apply to preclude recovery herein.

8. Division orders and unitization orders cannot be construed to modify the lease obligations of the defendant, being instruments reflecting royalty owners interests in proceeds from production and unitization of acreage for allowables respectively. No consideration is reflected in these instruments which would support defendant's contention that these instruments, executed subsequent to the original leases herein, were contracts to modify the royalty provisions of said leases. For the same reasons, the gas royalty agreements do not change defendant's obligations under their original leases except for agreements to the controlled price.

9. Defendants contention that the payment of the additional royalties in December 1972 constituted a "bounty" to plaintiffs is without any foundation and is contrary to said "gas royalty agreements" establishing the FPC approved prices as the basis for royalty payments.

10. To allow defendant free use of the royalty share of production for over ten years as a result of the difficulties and delays caused by the FPC regulations would unjustly enrich defendants. Defendant paid the full royalty share of proceeds collected prior to June 1, 1961, and after October 1, 1970. The decision to withhold the increased (but unapproved) rates in the intervening period was a unilateral decision by defendant that cannot rise to the stature of a defense of ratification. Nor does it support the "bounty" theory of defendant herein as noted above.

11. The statutory rate of interest herein in Kansas, Oklahoma and Texas is six per cent per annum and is allowed as the proper rate of interest to be applied to the suspended royalties herein from time of receipt until date of judgment herein with interest compounded on an annual basis.

12. Excluded from this judgment are those parties who have filed their elections herein to be excluded as members of the Plaintiff Class.

JUDGMENT IS THEREFORE entered for the Plaintiff Class as set forth herein with Defendant ordered to account to the Court as set forth herein for members of Plaintiff Class.

The issue of attorney fees is reserved pending the accounting ordered herein.

DATED July 29, 1976.

/s/ Keaton G. Duckworth

APPENDIX E

KANSAS STATUTES ANNOTATED

60-223. Class actions. (*a*) *Prerequisites to a class action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(*b*) *Class actions maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (*a*) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) The interest of members of the class in prosecuting or defending separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against members of the class; (C) the appropriate place for maintaining, and the procedural measures which may be needed in conducting, a class action.

(c) *Determination by order whether class action to be maintained; judgment; actions conducted partially as class actions.*

(1) As soon as practicable after the commencement and before the decision on the merits of an action brought as a class action, the court shall determine by order whether it is to be maintained as such. Where necessary for the protection of a party or of absent persons, the court, upon motion or on its own initiative at any time before the decision on the merits of an action brought as a nonclass action, may order that it be maintained as a class action. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) The judgment in an action maintained as a class action shall extend by its terms to the members of the class, as defined, whether or not the judgment is favorable to them.

In any class action maintained under subdivision (b) (3), the court shall exclude those members who, by a date to be specified, request exclusion, unless the court

finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor. To afford members of the class an opportunity to request exclusion, the court shall direct that reasonable notice be given to the class, including specific notice to each member known to be engaged in a separate suit on the same subject matter with the party opposed to the class.

(3) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues such as the issue of liability, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this section shall then be construed and applied accordingly.

(d) *Orders in conduct of actions.* In the conduct of actions to which this section applies, the court may, without limitation, make appropriate orders: (1) Settling the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, or to include such allegations, and that the action in either case proceed accordingly. The orders may be combined with

an order under K.S.A. 60-216, and may be altered or amended as may be desirable from time to time.

(e) *Dismissal or compromise.* An action maintained as a class action shall not be dismissed or compromised without the approval of the court, and the court in its discretion may order that notice of a proposed dismissal or compromise be given to the class in such manner as the court may direct. [L. 1963, ch. 303, 60-223; Am. by Supreme Court (order dated July 17, 1969); eff. on publication in Kan. Reports and in K.S.A. 1969 Supp.]

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Amendment 14.—RIGHTS AND IMMUNITIES OF CITIZENS

Revisor's Note:

Proclamation declaring fourteenth amendment ratified dated July 28, 1868. (Kansas ratified previous to date of said proclamation.)

§ 1. Citizenship; privilege or immunities; due process clause. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL RULE OF CIVIL PROCEDURE

Rule 23. Class Actions.

(a) PREREQUISITES TO CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive re-

lief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action To Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings

be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-848

NORTHERN NATURAL GAS PRODUCING COMPANY and MOBIL OIL CORPORATION,

Petitioner,

vs.

HAZEL NIX and FRED SCHUPBACH, JR., Individually and as representatives of all that class of gas royalty owners under Northern Natural Gas Producing Company and Mobil Oil Corporation oil and gas leases in the Hugoton-Anadarko area,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

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January, 1978

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NORTHERN NATURAL GAS PRODUCING COMPANY and MOBIL OIL CORPORATION,
Petitioner,

vs.

HAZEL NIX and FRED SCHUPBACH, JR., Individually and as representatives of all that class of gas royalty owners under Northern Natural Gas Producing Company and Mobil Oil Corporation oil and gas leases in the Hugoton-Anadarko area,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the Supreme Court of the State of Kansas are as reported in the Petition. In addition, the Trial Court's Class Order and Notice are attached hereto as an Appendix. (F-1 to F-6.)

JURISDICTION

The jurisdictional requisites are set forth in the Petition for Certiorari.

QUESTION PRESENTED

The federal question, if any, is: Whether it is a violation of Northern Natural's and Mobil's (hereinafter, Mobil) due process rights or equal protection for non-resident members of plaintiff class to be included in the benefits of a Kansas State Court judgment against Mobil.

STATUTE INVOLVED

K.S.A. §60-223, Kansas Class Action Statute, as set forth in Appendix E to the Petition.

STATEMENT OF THE CASE

This is one of four cases in which major oil and gas producing companies are seeking review of opinions of the Supreme Court of Kansas finding the companies liable for interest on gas royalties *suspended* and *used* by the companies pending Federal Power Commission opinion and approval of the opinion. The other cases are:

Phillips Petroleum Company v. *Shutts, et al.*, No. 77-856;

The Superior Oil Company v. *Sterling, et al.*, No. 77-847;

Gulf Oil Corporation v. *Maddox, et al.*, No. 77-798.

Beginning in 1967, Mobil began collecting from its gas purchasers in the Hugoton-Anadarko area on the basis of increased rates as filed with the Federal Power Commission, but Mobil continued paying its gas royalty owners on the basis of the old rates.[1]

1. See Appendix A-2, A-3, Mobil's Petition for Writ of Certiorari; also *Shutts, et al.* v. *Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292.

The Hugoton-Anadarko area is a rate making area for gas production as defined by the Federal Power Commission and it consists of all of the State of Kansas and certain parts of the states of Texas and Oklahoma. (See *Shutts*, Appendix A17.)

Plaintiffs Nix and Schupbach filed this action individually and as representatives of that class of oil and gas royalty owners under defendant Mobil's oil and gas leases in the Hugoton-Anadarko rate making area.

The increase in gas rates collected by Mobil went into Mobil's corporate treasury, was commingled with other corporate funds and was used by Mobil as a part of its business operations.[2]

FPC Opinion No. 586 was entered on September 18, 1970, approving most of the rate increases filed. The validity of FPC Opinion No. 586 was challenged in the courts and finally sustained on October 28, 1972.[3]

Subsequently, in May, 1973, 5,739 of Mobil's gas royalty owners were paid approximately $1,500,000.00 as their royalty interest share of the suspended rates. This amount was the royalty interest share (normally 1/8th), without interest. (A3.)

Portions of the suspended rates were not approved and were refunded to defendant Mobil's gas purchasers with interest at the rate of 7% per annum until October 1, 1970, and at the rate of 8% per annum thereafter until refunded.[4]

The FPC has no jurisdiction over amounts paid to gas royalty owners (*Mobil Oil Corp.* v. *Federal Power Com-*

2. See Appendix A21.

3. See *Shutts*, Appendix A24.

4. See *Shutts*, Appendix A19.

mission, 463 F.2d 256) (D. C. Cir.), cert. denied, 406 U.S. 1976 (1972) and had no regulations purporting to cover interest in relation to royalty interests in the suspended payment held and used by Mobil.

Plaintiffs were allowed to proceed by order of the Kansas District Court, as a class action, and all members of the class were served with notice by first class mail and by publication.[5]

Mobil was not required by FPC or any other authority to keep the royalty owners' share of suspense monies in suspense and not pay it out; this was a matter determined by Mobil.[6]

Ordinarily, if a question of jurisdiction were to be raised as to nonresident members of plaintiff class, it would be raised by a nonresident member in the court of another state, after judgment against plaintiff class. However, in this case, Mobil attempts to raise the question of jurisdiction of the Kansas courts over nonresident members after judgment in favor of plaintiff class, in order to save itself from paying a substantial part of the judgment against it. Statutes of limitation have run against the payment of interest on the FPC suspense royalties in Oklahoma and Texas.[7] Royalty owners in the Hugoton-Anadarko area are not entitled to go into the federal court and bring a class action because most of the claims are less than $10,000.00.[8] This leaves the Kansas court as the only forum and the Kansas court's judgment in this case as the only possibility of nonresidents obtaining interest on the FPC royalty funds here involved.

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5. See Appendix F, this Brief for full copy of Trial Court's Class Order and Notice.

6. See *Shutts*, A62.

7. See *Shutts*, A37.

8. See *Shutts*, A36 and cases there cited.

Mobil does business in Kansas and has been duly served with process in Kansas. No question is asserted as to the jurisdiction of the trial court or the Supreme Court over the defendant or the trial court's power to enforce a judgment against the defendant.

Mobil asserts the class includes nonresidents having no contact with Kansas. (Question Presented, Petition 3.) Not so. Whether or not "minimum contacts" are necessary, the many contacts that tie this certain group of Mobil royalty owners together are enumerated in the *Shutts* opinion, A55 and A56, as follows:

1. The names, addresses and suspense royalty amounts for each of the royalty owners are readily available in Mobil's records.

2. The class is more manageable with nonresidents of Kansas included because Mobil would be required to take an extra step in separating nonresident royalty owners in its records.

3. Mobil treated all royalty owners in the Hugoton-Anadarko area alike, regardless of residency, particular lease provisions or royalty agreements.

4. Kansas has a legitimate interest in adjudicating the common issue herein because Kansas comprises the largest physical area included in the FPC designated Hugoton-Anadarko area where Mobil is doing business and producing gas which it sells in interstate commerce.

5. All of the gas royalty owners in the Hugoton-Anadarko area have leases with Mobil and a common interest in the money collected by Mobil as "suspense royalties" from the sale of gas in the designated area.

6. It was the same FPC regulation that caused and permitted Mobil to collect the "suspense royalties", and the same FPC Opinion No. 586 pursuant to which the "suspense royalties" were paid out to the royalty owners in the area.

7. All of the gas royalty owners in the Hugoton-Anadarko area have a right in common with each other, in the equivalent of a common fund, to claim damages for commingling and use of the "suspense royalties" by Mobil, payable as interest, and they have a contact with Kansas by reason of such common interest.

Mobil attempts to mislead this Court by referring to the "mere mailing of a postcard" notice. (Petition 10, Footnote 10.) Notice mailed was not a postcard but was a full page notice fully advising class members of the nature and effect of the suit, the effect of a judgment favorable or unfavorable, and how to "opt out" if desired. (See full contents of Notice at Appendix to this Brief. (F-4 to F-6.) Notice was sent by *first class mail.* (Trial Court's Finding of Fact No. 6 at A74.)

REASONS FOR NOT GRANTING THE WRIT

The decision of the Kansas Supreme Court is thorough and thoughtful. The state court was fully aware of and closely adhered to the decisions of this Court. Mobil raises no issue not considered and answered in the Kansas Court's opinion. (See *Shutts,* Appendix A8 to A72 of Petition; See also the Kansas Class Action Statute, 60-223, which closely follows Federal Rule No. 23, at Appendix E of Petition.)

This Court Should Not Grant a Writ to Consider Issues Raisable, If at All, in a Later Proceeding

Mobil suggests it is denied equal protection and due process because members of the plaintiff class over whom Kansas did not have personal jurisdiction are not bound by the Kansas court judgment, and thus could relitigate their claims. Without conceding for a moment the Kansas court did not have authority to include nonresidents in the class or class members are not bound, it is significant Mobil's argument bears considering only in the event class members attempt to relitigate their claim.

The Kansas court judgment granted to members of the class everything they filed suit to secure. It is far too tenuous to assume first, a dissatisfied class member exists; second, if he does exist, he will try to relitigate the claim, having secured by Kansas judgment all he could possibly obtain; and third, if he tries to relitigate the claim the forum court will find he was not bound by the Kansas court judgment.

The nonresident members do not want to relitigate. They do not want Mobil arguing "for" them. They are a part of plaintiff class represented by this Brief. They want to be left in the case.

Mobil asks this Court to supply a wholly hypothetical answer to its wholly hypothetical question.

It Would Be Improvident for This Court to Grant a Writ to Consider Questions Readily and Consistently Answered by Its Prior Decisions

Even if Mobil's case is not hypothetical, it is contrary to this Court's opinions and well established law.

There is no challenge to the *in personam* jurisdiction over the defendant, or the Kansas court's power to enforce

a judgment against the defendant. See *Shutts* at A30. Nevertheless, Mobil relies on *International Shoe* v. *State of Washington*, 326 U.S. 310 and others pertaining to acquiring jurisdiction over a defendant. (Petition 6.) The class fully agrees with the holding of these cases. They are, however, thoroughly inapposite.

None of such cases were class actions. There was no plaintiff or defendant class in any of them. (See discussion of these cases in *Shutts*, A31 to A33.) They pertain to *defendants* only—not plaintiff classes.

"Minimum contacts" has always been held to apply to a defendant. It has never been applied to a plaintiff or plaintiff class. A plaintiff can choose his own forum.

Even if "minimum contacts" does apply, there were sufficient contacts here to justify the exercise of jurisdiction over nonresidents and to include them in the plaintiff class. (See *Shutts* A55, A56.) Since Kansas had *in personam* jurisdiction over the defendant, it likewise had jurisdiction over the common fund and thus contact with all persons who shared in the fund. For this reason, in *Hartford Life Ins. Co.* v. *Ibs*, 237 U.S. 662, 59 L. Ed. 1165, 35 S. Ct. 692, this Court held a Minnesota resident bound by an earlier Connecticut State Court judgment.[9]

In this case, the Kansas Court said:

"To hold that Phillips' act of using the money for business purposes, and not putting it in a separate corporate account, takes this case out of the 'common fund' category would reward Phillips' action at the

9. See also, *Shutts*, A46-49; and other common fund cases: *Royal Arcanum* v. *Green*, 237 U.S. 531; *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356; *Sovereign Camp* v. *Bolin*, 305 U.S. 66; *Carpenter* v. *Pacific Mutual Life Ins. Co.*, 10 Cal. 2d 307, 74 P.2d 761 (1937), aff'd sub nom. *Neblett* v. *Carpenter*, 305 U.S. 297, reh. denied, 305 U.S. 675.

expense of innocent gas royalty owners." (*Shutts*, B37.)

Therefore, it was proper to include in the class all contributing to it, residents and nonresidents of Kansas alike.

Contacts also arose because of the first class mail notice sent to residents and nonresidents. The notice advised recipients of the pendency of the suit in Kansas, the nature and effect of the suit, afforded them an opportunity to opt out and informed them by remaining in the class they would be bound by any judgment, favorable or unfavorable. (See Notice, Appendix to this Brief F3 to F5.)

Without regard to contacts, first class mail notice provided the essential requisites of due process so as to bind members of the class.[10]

Due process was also afforded class members by adequate representation. See *Eisen* at 176. In *Shutts* at A54, the court states regarding the same attorneys:

"Here we find adequate representation has been afforded the plaintiff class members by their representative through his attorneys who have done a superior job in bringing this action and arguing and briefing the law on this appeal."

Mobil's reliance on the territorial boundaries of Kansas is equally misplaced. Procedural due process guarantees are the test of a binding judgment and the test for proceeding as a class action. Mobil's argument evidently

10. *Eisen* v. *Carlisle & Jacqueline*, 417 U.S. 156, 176; *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306; Cf. *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 542, 549; also *Advisory Committee Notes*, 28 U.S.C.A. at 302, where it is said "notice . . . is designed to fulfill requirements of due process to which the class action is of course subject."

rests on *Pennoyer* and its progeny, which "simply makes the point that states are defined by their geographical territory." *Shaffer* v. *Heitner*, ... U.S. ....., 97 S. Ct. 2569, 2580 (1977).

Mobil overlooks Federal Rules of Civil Procedure 23 does not expand federal court jurisdiction (*Snyder* v. *Harris*, 394 U.S. 332), yet typically binds class members with no contact with the forum.

Moreover, the propriety of binding absent class members outside the jurisdiction of the forum court was decided long ago. This is because there is a difference in the jurisdictional standards governing class actions and other actions. In *Hansberry* v. *Lee*, 311 U.S. 32, this court found:

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party . . .
>
> To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, . . . may bind members of the class or those represented who were not made parties to it. . .
>
> Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make it difficult or impossible the joinder of all *because some are not within the jurisdiction* or because their whereabouts is unknown . . . 311 U.S. at 40-2. (Emphasis supplied.)

To bind absent class members, the due process protections of notice and representation must be afforded.[11] This was provided here and Mobil challenges neither the method of notice nor the form or quality of representation.

In *Advertising Specialty National Ass'n* v. *Federal Trade Commission*, 238 F.2d 108, 120 (1st Cir. 1956), the court found foreign members bound by a judgment in a proper class suit even though outside the jurisdiction.

Many commentators have considered the question raised by Mobil. They support the Kansas court's decision on the issue. Professor Chafee in *Some Problems of Equity*, 258 (1950) notes the Restatement of Judgments "gives the court where a class action has been properly brought jurisdiction to bind unnamed members, even if not personally within the jurisdiction of the court." Likewise, Professor Moore in his treatise, 3B Moore's Federal Practice, ¶23.11 (5), in discussing the 1928 Federal Rules of Civil Procedure 23 indicates:

> "The fact that members of the class are beyond the territorial limits of the class suit court is immaterial as to the binding effect of the class suit judgment."

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11. See page 140 of *Appleton Electric Co.* v. *Advance-United Expressways*, 494 F.2d 126, where it is said: "The notice and exclusion provisions of Rule 23 (c) (2) were designed to 'fulfill requirements of due process to which the class action procedure is of course subject.' 28 U.S.C., Rule 23, Advisory Committee's Note at 302. The clearest statement of those requirements is in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). To be bound by a final judgment in a representation suit, one must be 'informed that the matter is pending and [have the opportunity] to choose for himself whether to appear or default, acquiesce or contest.' 339 U.S. at 314, 70 S. Ct. at 657. The kind of notice mandated in *Mullane* is exactly the kind of notice defendant class members will receive in this case . . . The members' contacts with the forum are as irrelevant here as were beneficiaries' contacts with the State of New York in *Mullane*."

The Restatements are also in agreement. The Restatement of Judgments states:

> Section 26. Representative or Class Actions.
>
> "Where a class action is properly brought by or against members of a class the court has jurisdiction by its judgment to make a determination of issues involved in the action which will be binding as res judicata upon other members of the class, although such members are not personally subject to the jurisdiction of the court."

Tentative draft number 2 of the Restatement (Second) of Judgments §85 (April 15, 1975) provides:

> "(2) A person represented by a party to an action is bound by the judgment even though the person himself does not have notice of the action, is not served with process, or is not subject to the service of process."

See also, Note, "Consumer Class Action of a Multi-State Class: A Problem of Jurisdiction," 25 Hast. L. J. 1411, 1432, 1435 (1974);[12] and 30A C.J.S. *Equity* §1456 (4) at 124.

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12. 25 Hastings Law Journal, 1411, pages 1432 and 1435: "A class action must proceed in the absence of almost every class member. Therefore, ultimately, the residential makeup of a class is unimportant. What is important is that the rights of absent members be justly protected and that members be given an opportunity to be heard if they so desire. These are the essential elements of due process, and they must be satisfied in any class action by every court, state or federal, regardless of the residences of the absent class members. Therefore, whereas the essential jurisdiction over a nonresident *defendant* is some tangible connection between him and the forum state, the *element necessary to the exercise of jurisdiction over plaintiff classes is procedural due process.* (Emphasis supplied.) (Page 1432.). . .

"It is . . . the suggestion of this note that by adhering to the same jurisdictional standards of due process required on the federal level, state courts *can* exercise jurisdiction over a class action regardless of the citizenship of the class members." (Page 1435.)

This Court has implicitly concluded class actions with a multi-state class can and should be brought in state courts. In *Snyder* v. *Harris*, 394 U.S. 332, the Court noted class actions premised on diversity of citizenship can "most appropriately be tried in state court" (Id. at 341) and plaintiffs "had nothing to fear from trying the lawsuit in the courts of their own state." (Id. at 340.) (See, also *Zahn* v. *International Paper Co.*, 414 U.S. 291.) This led the court in *Shutts* to question, at A37, "[i]f the state courts will not hear the matter, who will grant relief?" See *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356, 366.

The meaning of the words "due process" evidently escapes Mobil. Fair play and substantial justice have been afforded all. "Fair play and substantial justice" (as called for in *Shaffer* v. *Heitner*, *supra*) can only be afforded nonresident members of plaintiff class by allowing them the benefit of their judgment against Gulf—not by taking it away from them. An *in personam* judgment against the defendant has been rendered which will benefit class members who after notice and representation elected to stay in the class.

Judge Morris E. Frankel noted:

> "If all the pertinent criteria are fairly satisfied, I believe we'll discover that the preliminary shock of 'binding' absent people will subside or disappear and that the intended functioning of the [class action] rule . . . actually promotes essential fairness and justice no less than the secondary goal of judicial efficiency." (43 F.R.D. 45, 46.)

See also Homburger, "State Class Actions and the Federal Rule," 71 Colum. L. Rev. 601, 641 (1971), arguing in many cases the denial of class relief would be "tan-

tamount to the denial of substantive justice." Separate suits in each of the many states where class members reside would be an extraordinarily inefficient, expensive and burdensome method of proving the liability. Mobil is merely attempting to eliminate or diminish its liability through a subterfuge.

Mobil argues that there is one Pennsylvania case and one New Jersey case opposed to the *Shutts* opinion. There is no contradiction in the holding of various state courts as to the law. Both the Pennsylvania and New Jersey cases were discussed in *Shutts* (A-43 to 46) and held inapplicable for reasons there stated.[13]

Mobil contends that its royalty owners had "no gas to sell" and "no interest in the proceeds of sale." (Petition 17.) The Kansas court answered this mistaken contention very well at A65 and A21, A22.[14]

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13. (a) Re: *Klemow* (Pa.): "It is apparent the Pennsylvania statutory language is completely at variance with the Kansas statutory language." See *Shutts* at A41, and the sharp difference in the Pennsylvania statute as compared to Kansas where it is said in the Pennsylvania statute as to a class action:

". . . the judgment in such action shall not impose personal liability on anyone not a party hereto."

(b) Re: *Feldman* v. *Bates* (N.J.): "An excellent example of a *factual situation* in which a trial judge applying our class action statute should deny certification of a class action, where nonresident plaintiff class members are involved, is presented in *Feldman* v. *Bates Mfg. Co., supra.*" (*Shutts*, A-52.)

14. "We are dealing with 'suspense royalties' which never could or would belong to Phillips." (*Shutts*, A65.)

"It is important to note that during this period of time (June 1, 1961, to October 1, 1970) *Phillips had no entitlement to the gas royalty owners' share of the 'suspense royalties,' whether or not the rates were approved by FPC.* Phillips never owned the money. . . . That royalty share, according to eventual FPC ruling, was either to go to Phillips' royalty owners or back to Phillips' gas purchasers with interest or part to one and part to the other." (*Shutts*, A21, A22.)

Cases cited by Mobil holding that royalty owners are not engaged in the "sale of gas" are readily distinguishable.

Mobil further argues that there is a provision in K.S.A. 60-223 not included in Federal Rule of Civil Procedure 23 that forecloses a nonresident member of plaintiff class from opting out—thereby violating his constitutional rights.

This is a moot question. No member of plaintiff class in this case asked to be excluded who was not excluded. (Conclusion of Law No. 10, A79.)

The decision of the Kansas court clearly is correct and consistent with the decisions of this Court and other well established law. Mobil raises no questions not answered by the opinion in *Shutts*, and this Court's own decisions.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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January, 1978

APPENDIX F

CLASS ORDER AND ORDER FOR NOTICE

(Filed March 26, 1975)

ON this 10th day of February, 1975, this matter comes regularly on for hearing on plaintiffs' Motion for an Order determining this action to be a class action. Plaintiffs are present by their attorneys, Gordon Penny of Chapin & Penny, Medicine Lodge, Kansas, and Gary Hathaway of Hathaway & Kimball, Ulysses, Kansas. The defendants are present by their attorney, Richard Jones of Hershberger, Patterson & Jones, 700 Farm Credit Banks Building, Wichita, Kansas 67202.

THEREUPON, plaintiffs' Motion is presented and argued to the Court. Thereafter, the matter is briefed by counsel for the parties; and the Court, having examined the pleadings and files herein, having heard the statements and arguments of counsel, having read the briefs, and being well and fully advised in the premises, files his Memorandum Opinion herein dated November 7, 1974, which is made a part hereof by reference and further finds that this action should be maintained as a class action, subject to the limitations and conditions hereinafter set forth.

Thereafter, defendants file their Motion for reconsideration and oral argument of the same is duly presented to the Court on February 18, 1975, and the matter is briefed to the Court by the parties, and the Court, having heard the arguments, having read the briefs, and being well and fully advised in the premises further finds that the action complies with the requirements of K.S.A. 60-223

as amended, and that defendant's Motion for reconsideration should be overruled.

And the Court further specifically finds that:

1) The class hereinafter defined is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; the representative party plaintiffs will fairly and adequately protect the interests of the class; the prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the other members not parties to such adjudications and might substantially impair or impede their ability to protect their interests; and the questions of law and fact common to the members of the class predominate over any questions affecting only individual members and a class action is superior to the other available means for the fair and efficient adjudication of the controversy.

2) The plaintiff class shall be limited to all persons who were on or before May 1971, entitled to gas royalties (excluding overriding royalties) in the Hugoton-Anadarko area affected by F.P.C. Opinion 586 under leases owned by Northern Natural Gas Producing Company or Mobil Oil Corporation or any of their predecessor companies, and who in about May 1971, received additional amounts of royalty attributable to increased prices paid to defendants subject to refund to the gas purchaser, in and after February 1967, excluding, however, all such royalty owners as to any such royalties in Stevens or Morton Counties, State of Kansas, and affected by the case of *Lightcap* vs. *Socony Mobil Oil Co., Inc.*, case number 4366, Stevens County, Kansas, or any similar actions filed against these

defendants or their predecessor companies in said counties prior to the filing of this action; further excluding any other claims against defendant for royalties not yet paid out and which are or may be the subject of separate litigation.

3) Notice of the nature and pendency of this action and the effects of any judgment herein shall be given to members of the above defined class as follows:

(a) Each member of the class as herein defined whose name and address is contained in defendants' records shall be notified of the pendency and ultimate legal effect of the action and of the right to request exclusion, by sending to each such class member a notice in the form of Exhibit "A", which is attached hereto and made a part hereof by reference. To the extent that such persons are currently the recipients of royalty payments by defendant, the aforesaid notice shall be dispatched to them by defendant.

(b) Defendants shall furnish to counsel for plaintiffs the names and addresses, to the extent such information is reflected by defendants' books and records, of all persons included in the plaintiff class who are not currently receiving royalty payments from defendants. Plaintiffs shall cause to be mailed to each of said persons a copy of this Notice attached hereto as Exhibit "A".

(c) As soon as possible hereafter, defendants will advise counsel for plaintiffs of the approximate number of notices required to be mailed to royalty owners as stated above in paragraph (a) and plaintiffs will supply a sufficient number of copies of this notice for the mailing. Mailings should be made no later than in May 1975, and the time limitation for those

desiring to be excluded should be no later than June 15, 1975, at 10:00 a.m., at which time hearing will be held to determine actual class members.

(d) Plaintiffs shall cause the notice attached hereto as Exhibit "A" to be published beginning the second week in April 1975, once each week for three consecutive weeks in a newspaper of general circulation published in the following locations: Amarillo, Texas; Elkhart, Kansas; Liberal, Kansas; Guymon, Oklahoma; and Ulysses, Kansas.

(e) Plaintiffs will advance the costs pertaining to all publication and mailing referred to in paragraphs (b), (c), and (d) above.

(f) Cases previously filed in this judicial district which encompass part of the class covered by plaintiffs' Petition herein will proceed in the normal course of litigation.

IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED AND DECREED BY THE COURT that the foregoing findings should be and they are hereby made the Order and Judgment of this Court.

Exhibit "A"

NOTICE OF CLASS ACTION SUIT

TO: All persons who were on or before May 1971 entitled to gas royalties (excluding overriding royalties) in the Hugoton-Anadarko area affected by F.P.C. Opinion 586 under leases owned by Northern Natural Gas Producing Company or Mobil Oil Corporation or any of their predecessor companies, and who in about May 1971, received additional amounts of royalty attributable to increased prices paid to defendants subject to refund to the

gas purchaser in and after February 1967, excluding, however, all such royalty owners as to any such royalties in Stevens or Morton Counties, State of Kansas, and affected by the case of *Lightcap* vs. *Socony Mobil Oil Co., Inc.*, Case No. 4366, Stevens County, Kansas, or any similar actions filed against these defendants or their predecessor companies in said counties prior to the filing of this action, further excluding any other claims against defendant for royalties not yet paid out and which are or may be the subject of separate litigation.

This suit was filed in January 1974 by Hazel Nix in her own behalf and on behalf of all persons to whom this notice is directed. Fred Schupbach, Jr., on May 22, 1974, was granted leave to join as a party plaintiff in his own behalf of all other royalty owners similarly situated in the Hugoton-Anadarko area. These named plaintiffs asked judgment against the defendant companies for the payment of interest on increased royalty monies received and withheld by defendants pending final approval by the Federal Power Commission. The leases involved are in Kansas and parts of Texas and Oklahoma.

Defendants have denied any liability to the plaintiffs or members of the above class.

The Court has determined that this action is to be maintained as a class action. Accordingly:

1. The Court will include as members of the plaintiff class herein all of the gas royalty owners addressed above; provided, however, any person or concern so included may by filing a written request to the Clerk of the District Court of Grant County, Ulysses, Kansas 67880, on or before the 14th day of June, 1975, be excluded from the class unless upon notice and after hearing, and for stated reasons, the Court finds that their inclusion

is essential to the fair and efficient adjudication of the controversy. Any class member if he so desires, may appear in the case in person or through his own counsel; otherwise, plaintiffs' counsel will represent him as a member of plaintiff class.

2. Judgment in this action, whether for the plaintiff class or for the defendant, will be binding on all class members except those who may be excluded as above stated. Class members excluded will not be entitled to share in the benefit of any judgment or settlement entered or concluded favorable to the plaintiff class.

3. Plaintiffs' attorneys' fees are contingent on recovery. If plaintiffs are successful, the Court will allow reasonable attorneys' fees for plaintiffs' attorneys. If plaintiffs are unsuccessful, there will be no allowance to the plaintiff class.

Keaton G. Duckworth
Judge of the 26th Judicial District

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